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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT

OF THE

STATE OF INDIANA,

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-BOOKS
CITED, STATUTES CITED AND CONSTRUED, AN INDEX
AND NOTES TO THE REPORTED CASES**

PHILIP ZOERCHER,
OFFICIAL REPORTER

NORMAN E. PATRICK, Assistant Reporter

VOL. 50

**CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1911,
NOT REPORTED IN VOLUME 49, AND CASES DECIDED
AT THE MAY TERM, 1912.**

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.

HON. MILTON B. HOTTEL.*¶
HON. ANDREW A. ADAMS.‡¶
HON. EDWARD W. FELT.**¶
HON. JOSEPH G. IBACH.‡‡¶
HON. MOSES B. LAIRY.¶
HON. DAVID A. MYERS.†
HON. FRANK S. ROBY.§

*Chief Justice at May Term, 1912.

‡Presiding Judge at May Term, 1912.

**Chief Justice at November Term, 1911.

‡‡Presiding Judge at November Term, 1911.

‡Appointed March 21, 1901; elected in 1902 and 1906.

†Appointed October 18, 1904; elected in 1904 and 1908.

¶Elected in 1910.

OFFICERS
OF THE
APPELLATE COURT

**ATTORNEY-GENERAL,
THOMAS M. HONAN**

**REPORTER,
PHILIP ZOERCHER**

**CLERK,
J. FRED FRANCE**

**SHERIFF,
HARRY W. PEMBERTON**

**LIBRARIAN,
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NOTE.

The notes to the cases reported herein, have been prepared with the view of giving to the profession references practically to all the law decided in these cases. The volume and page of the Northeastern Reporter where these cases are reported supply the key number system, and references on points contained in the syllabi will be found following the syllabus number stated in parenthesis. These references are to Cyc., Lawyers Reports Annotated, American and English Annotated Cases, American Decisions, American Reports and American State Reports. This is done to give to the profession immediate access to decided cases, which we hope will prove convenient to the bench and bar.

REPORTER

CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1911, AND MAY
TERM, 1912, IN THE NINETY-SIXTH YEAR
OF THE STATE.

HASKELL, RECEIVER, v. GARDNER.

[No. 7,700. Filed December 30, 1910.]

1. **CORPORATIONS.—*Capital Stock.—Trust Fund for Creditors.—Stock Subscriptions.***—Money agreed to be paid into the treasury of a corporation on account of shares is regarded not only as a part of the fund for the transaction of business, but also as a trust fund for the benefit of creditors. p. 3.
2. **CORPORATIONS.—*Insolvency.—Receivers.—Unpaid Stock Subscriptions.***—Upon the insolvency of a corporation, a receiver therefor may be authorized to sue on account of unpaid stock subscriptions, but generally he cannot compel payment of a subscription that the corporation could not have enforced at the time of his appointment. p. 3.
3. **CORPORATIONS.—*Insolvency.—Receivers.—Action on Stock Subscription.—Defense.—Payment in Property.***—In an action by the receiver of a corporation on a stock subscription, where the evidence showed that defendant had sold to the corporation certain property which was of a value equal to that of the stock subscribed by defendant, and which was necessary in the business of the corporation and was received by it in payment of such subscription, the status of such stock was that of paid up stock, it being unnecessary, in the absence of a statutory requirement, that a subscription to capital stock shall be paid in cash. p. 3.
4. **CORPORATIONS.—*Action on Stock Subscription.—Payment.—Instructions.***—In an action brought by the receiver of an insolvent corporation to recover on a subscription to its capital stock, an instruction which told the jury that defendant was entitled as a creditor of the corporation to have his claim set-off against the

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amount alleged to be due from him on such subscription, even if erroneous, was harmless, where defendant had pleaded payment and there was evidence to sustain such plea. p. 5.

From Knox Circuit Court; *Orlando H. Cobb*, Judge.

Action by Lamar Haskell, as receiver of Taylor & Gardner, Incorporated, against George E. Gardner. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

W. A. Cullop, George W. Shaw, Rhea P. Cary and Frank M. Rogers, for appellant.

B. M. Willoughby and James M. House, for appellee.

COMSTOCK, J.—Appellant instituted this suit as receiver of Taylor & Gardner, a corporation, to recover on a subscription of capital stock subscribed by appellee. Issues were formed by a complaint, setting up the subscription, the appointment of appellant as receiver, and his authority to sue, and by an answer in three paragraphs, the first, a general denial, the second, a plea of payment, and the third, a set-off for various items consisting of services rendered the company, goods sold and delivered to it, and claims paid to its creditors, and reply in general denial to the second and third paragraphs of answer.

A trial by jury resulted in a verdict for appellee. Over appellant's motion for a new trial judgment was rendered that he take nothing, and for costs.

The errors relied on for reversal are that the verdict was not sustained by sufficient evidence and is contrary to law, and that the court erred in giving instruction number nine of its own motion.

It is claimed by appellant that appellee had no right of set-off as to the various items of indebtedness claimed to be owing him by the corporation prior to the appointment of the receiver; that the stock subscription of the appellee was a part of the assets of the insolvent corporation, and constituted a trust fund in the hands of appellant as receiver, in which fund each creditor of the corporation was

entitled to receive a ratable share, and that appellee, as one of the creditors, was not entitled to have his claims preferred by set-off, as the court charged the jury; and that the plea of payment was not supported by the evidence.

“The capital stock of a corporation is regarded, not alone as a fund for the transaction of corporate business, but also as a trust fund for the benefit of creditors. It is an

1. essential part of this doctrine that money agreed to be paid into the treasury on account of shares is a part of the fund. 10 Cyc. 653. Upon the insolvency of a corporation and the appointment of a receiver it is clear, in view of the fact that the capital stock constituted
2. an asset of the corporation, and that the receiver represents all of the creditors, that he may be authorized to sue on account of unpaid stock subscriptions. *Big Creek Stone Co. v. Seward* [1896], 144 Ind. 205 [42 N. E. 464, 43 N. E. 5]; *Gainey v. Gilson* [1897], 149 Ind. 58 [48 N. E. 633].”

For the purposes of litigation, the receiver takes only the rights of the corporation, such as could be asserted in its own name.

“Generally speaking a receiver cannot compel payment of a subscription that the corporation could not have enforced at the time of his appointment.” High, Receivers (3d ed.) §315; Wait, *Insolv. Corp.* §235; 3 Clark and Marshall, *Priv. Corp.* §799a; *Gainey v. Gilson, supra*; *Marion Trust Co. v. Blish* (1908), 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, and cases cited. But, on any view which may be taken of the rights of the receiver, there can be no

3. recovery in the case at bar, if the stock subscribed for has been paid as pleaded. And, on the question of payment, only evidence favorable to appellee will be considered, together with the reasonable inferences therefrom.

It is insisted by appellant that the resolution of the board of directors was simply to purchase the property of Taylor

& Gardner at a valuation of \$7,200, and not that the property be accepted in payment of the aggregate of \$7,200 stock subscription by them.

The entry in the minute book of the corporation with reference to this subject, and which was introduced as a part of the evidence, is as follows:

“It was moved by Mr. French and seconded by Mr. Rodgers and unanimously carried, that the following equipment be purchased from the firm of Taylor & Gardner at and for the price of \$7,200, it appearing to the board that said price is a fair and reasonable one for the articles enumerated and that the purchase of them is necessary in the conduct of the corporate business:

Black car	\$1,650 00
Gray car	975 00
Wagon	300 00
Call Buggy	375 00
Ambulance	880 00
Horses	1,000 00
Harness, etc.	162 00
Mdse.	963 00
Furniture and Fixtures.....	895 00
	<hr/>
	\$7,200 00

There being no further business the directors' meeting adjourned.”

The property received in payment was necessary in the business of the corporation, and thus the stock subscribed for was paid “in money's worth”; and the shares were given the status of paid-up stock. George E. Gardner testified that this equipment was turned over to the corporation in payment of the stock subscription. The evidence shows that this property was purchased by Taylor & Gardner, and used by them and sold to the corporation after it was formed; that with the exception of the call buggy all the property was delivered to the corporation.

“Whatever may have been formerly held, it is now established that subscriptions to capital stock need not, in the absence of statutory provisions requiring it, be paid for in

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cash.” *Coffin v. Ransdell* (1887), 110 Ind. 417, 11 N. E. 20.

The claim made by counsel for appellant, that this property was encumbered by the equitable lien of the vendor, we do not find to be supported by the evidence.

There is evidence that appellee made payment in 4 money and other property to said corporation, for which he was entitled to credit. An itemized statement of these amounts need not be stated.

There being evidence to sustain the plea of payment, the instruction complained of, even if erroneous—which we do not concede—was harmless.

Judgment affirmed.

NOTE.—Reported in 93 N. E. 458. See, also, under (1) 10 Cyc. 461; as to the nature and validity of the subscription agreement to corporate stock, see 136 Am. St. 736; as to the liability on subscription to stock, see 93 Am. St. 349; as to stockholders' liability to creditors, see 3 Am. St. 806; (2) 34 Cyc. 395; as to the appointment of receivers for corporations, see 72 Am. St. 29; 118 Am. St. 198; (3) 10 Cyc. 471. As to the right in an action by a corporate receiver to recover unpaid balance of stock subscriptions, to interpose a defense that would have been available against the corporation, see 18 L. R. A. (N. S.) 347. As to the effect of an express provision by statute or charter for payment of subscription to stock in cash or money to exclude payment in services or property, see 27 L. R. A. (N. S.) 315.

CAUGHELL v. INDIANAPOLIS TRACTION AND TERMINAL COMPANY.

[No. 7,525. Filed March 27, 1912.]

1. CARRIERS.—*Carriers of Passengers.—Alighting from Street Car.—Duty of Employe.—Instruction.*—Employees of street railways must use the highest degree of care to see and know that no passenger is alighting from a car before putting it in motion, but are not required absolutely to see and know, and the trial court committed no error in refusing an instruction, in an action for personal injuries sustained while alighting from a street car, which told the jury that the law requires the employes of street railways to do more than stop reasonably long enough for passengers

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to alight safely, that they are bound to ascertain and know that no passenger is in the act of alighting before putting the car in motion again. p. 7.

2. **CARRIERS.—Carriers of Passengers.—Starting Car.—Duty of Conductor.—Instruction.**—The duty of a conductor who stops his car for passengers to alight is two-fold—he must wait a reasonable length of time for the passengers to alight, and then he must exercise the highest degree of care consistent with the proper transaction of the business to see and know that no passenger is in the act of alighting before putting the car in motion, and an instruction is improper which is based on the assumption that when the conductor had waited a reasonable length of time the defendant was not liable unless the conductor actually saw plaintiff attempting to alight when he started the car, regardless of whether he was exercising the proper degree of care to see and know that no one was alighting at that time. p. 8.
3. **APPEAL.—Tendering Proper Instruction.—Waiver.**—Where plaintiff tendered on a branch of the case an instruction at the time fully supported by authority, but later superseded by the decision of the Supreme Court, and the court refused to give to the jury the instruction tendered, but gave one which, though not a positive misstatement of the law, did not fully cover the issue covered by the instruction tendered and refused, the plaintiff by his failure to tender other instructions on the same branch of the case should not be held to have waived the right to an instruction fully covering said branch. p. 9.
4. **TRIAL.—Issues.—Instructions.**—In an action for damages for injuries sustained while alighting from a street car, an instruction giving undue prominence to issues about which there was no dispute and directing the attention of the jury specially to them, without mention of the one most material to the case, must be held to have misled the jury in the absence of an instruction on said omitted issue. p. 10.

From Superior Court of Marion County (77,138); *Pliny W. Bartholomew*, Judge.

Action by Flora J. Caughell against the Indianapolis Traction and Terminal Company. From a judgment for defendant, plaintiff appeals. *Reversed.*

James & Martin, D. J. Hefron, for appellant.

F. Winter, W. H. Latta, for appellee.

IBACH, P. J.—Appellant sued appellee for personal injuries alleged to have been caused by appellee's conductor

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negligently starting a street-car on which she was a passenger, while she was in the act of alighting therefrom, thus throwing her to the street and severely injuring her. Trial by jury resulted in a verdict for appellee. Appellant's evidence tended to support the theory of her complaint, that of appellee tended to show that appellant jumped off after the car started.

The only errors argued are that the court erred in refusing to give to the jury instruction one, requested by appellant, and in giving instructions seven and nine on its own motion.

Instruction one is as follows: "The court instructs the jury that the law requires the employes of street railways to do more than to stop reasonably long enough for
1. passengers safely to alight from cars. They are bound and required to ascertain and to know that no passenger is in the act of alighting from the car before putting it in motion again. If the employe fails in that respect, then such failure is imputed to his employer, and is actionable negligence on the part of the employer, and it is no excuse for the employe or his employer to show that the car on the particular occasion was operated in the usual manner."

This instruction would be justified on the authority of *Anderson v. Citizens St. R. Co.* (1895), 12 Ind. App. 194; *Crump v. Davis* (1904), 33 Ind. App. 88, and *Union Traction Co. v. Siceloff* (1905), 34 Ind. App. 511. But in the case of *Louisville, etc., Traction Co. v. Korbe* (1911), 175 Ind. 450, the Supreme Court of this State disapproved such an instruction, on the ground that employes of street railway companies must use the highest degree of care to see and to know that no passenger is alighting from a car before putting it in motion, but are not required absolutely to see and to know. The Appellate Court cases before cited have been superseded by this decision. No error was committed by the trial court in refusing to give instruction one.

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By instruction seven, the court told the jury that if plaintiff, a passenger on defendant's car, who had paid her fare, had given signals to stop said car at Twenty-third 2. street, and the car was stopped for the purpose of allowing her to alight at said place, then "under the law, it was the duty of the conductor and the motorman of said car to allow plaintiff sufficient time safely to alight upon the street and at said crossing, and if you find that while said car was standing still, and the plaintiff was in the act of leaving said car, and in plain view of the conductor of the defendant, in control of said car, said conductor gave the starting signal," and the car was started, and by reason of the starting of the car plaintiff was thrown to the street and injured, and defendant was guilty of negligence in starting the car, and plaintiff's negligence did not contribute thereto, then the starting of the car would be the proximate cause of her injury, and the verdict should be for her.

This was the only instruction given embracing the theory of plaintiff's action, and it did not adequately state the duty of appellee's conductor toward appellant. The duty of the conductor of a street-car, who stops his car for passengers to alight, is two-fold; he must wait a reasonable length of time for the passengers to alight, and then he must exercise the highest degree of care consistent with the proper transaction of the business to see and to know, before putting the car in motion, that no passenger is in the act of alighting. *Louisville, etc., Traction Co. v. Korbe*, *supra*, and cases cited; *Indiana Union Traction Co. v. Keiter* (1911), 175 Ind. 268; *Citizens St. R. Co. v. Hoffbauer* (1900), 23 Ind. App. 614, 627. In the present case, the conductor's duty to use the highest degree of care towards appellant, a passenger, was not completed when he had waited what he regarded a sufficient length of time for her to alight. After the conductor waited a reasonable length of time for appellant to alight, appellee would be liable for

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appellant's injury caused by starting the car, not only if she was in the act of alighting in plain view of the conductor, but also if she was in the act of alighting, and the conductor, in the use of the highest degree of care, could have seen her. Instruction seven is based on the assumption that when the conductor had waited a reasonable length of time, appellee was not liable unless the conductor actually saw when he started the car, that appellant was attempting to alight, whether or not he was exercising the proper degree of care to see and know that no one was alighting at that time. Appellant's contention was that the conductor could have seen her attempting to alight from the car at the time he started it, if he had been in the exercise of due care, and not that he actually saw her. The issue ignored by instruction seven, as to whether the conductor was in the exercise of due care to see that no passengers were attempting to alight when he started the car, is the one issue most material to appellant's case, and the

jury should have been instructed thereon. Appellee

3. claims that instruction seven is not a positive misstatement of the law, but does state facts on which appellant could have recovered, and that if it did not go far enough in one direction to conform to the views of counsel for appellant, they should have presented a correct instruction which did. This is a well-recognized rule, founded on the doctrine of waiver, and we do not wish to be understood as relaxing that rule, but here we find a case marked with peculiar circumstances. Counsel for appellant presented on this issue instruction one, at that time fully supported by authority, though superseded since the trial. Since the court refused this instruction, which expressed the law as it had been declared by this court up to the time of the trial of this case, counsel should be excused from tendering other instructions on the same branch of the case, and should not be held to have waived the right to instruction on the omitted branch of the case.

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Instruction seven gave undue prominence to the questions whether the conductor waited what he regarded a sufficient time for passengers to alight before starting the car, 4. and whether he actually saw appellant attempting to alight when he started said car. Both these issues were less material in the present case than the question whether he was exercising the highest degree of care to see and to know that no one was in the act of alighting before starting the car. There is no evidence that he actually saw appellant attempting to alight, but there is testimony to the effect that she was attempting to alight at the time the car was started, and that the conductor, in the use of due care, could have seen her. In the absence of an instruction on this issue instruction seven, which singled out other issues, about which there was no dispute, and directed the attention of the jury specially to them, without mention of the one most material to the case, must be held to have misled the jury, for it may well have believed that the facts therein stated were the only ones on which appellant could recover.

We have read the evidence, and while we cannot say that there is no evidence which would tend to support a verdict for appellee had the jury been properly instructed, yet, taking into consideration all the instructions given to the jury, and all the evidence in the case, we feel that substantial justice was not done, and that the interests of justice will be best subserved by granting a new trial.

Judgment reversed, and cause remanded for new trial.

NOTE.—Reported in 97 N. E. 1028. See, also, under (1, 2) 6 Cyc. 615; as to the duty and liability of street car companies to passengers, see 118 Am. St. 461; for the measure of diligence required towards passenger on street railways generally, see 4 L. R. A. (N. S.) 122; on the question of the duty of a street-car conductor to see that passenger is off before starting the car, see 11 L. R. A. (N. S.) 140; as to the liability of a street car company for injury to alighting passenger by starting of car on signal of fellow passenger, see 27 L. R. A. (N. S.) 764; on the question of time allowed passenger to alight, see 4 L. R. A. (N. S.) 140; (3) 38 Cyc. 1718; (4) 38 Cyc. 1674.

GOLDSMITH v. FIRST NATIONAL BANK OF REDLANDS.

[No. 7,330. Filed November 22, 1911. Rehearing denied March 27, 1912.]

1. **APPEAL.—Law of Case.—Pleading.**—Where the complaint in an action has been held sufficient by the Appellate Court on a former appeal that ruling whether right or wrong became the law of the case and will be applied throughout the entire proceedings. pp. 14, 15.
2. **APPEAL.—Law of Case.—Pleading.**—Where the question presented for decision on the former appeal of a cause did not require the Appellate Court to pass on the sufficiency of the complaint, then any thing which such court may have said in an attempt to decide such question will not have the effect of determining its sufficiency on a second appeal. p. 14.
3. **PLEADING.—Complaint.—Answer.—Demurrer.**—It is well settled that a demurrer searches the record and that a bad answer is sufficient for a bad complaint. p. 16.
4. **APPEAL.—Pleading.—Complaint.—Answer.**—It is necessary for the Appellate Court to determine the sufficiency of a complaint to withstand a demurrer for want of facts before the judgment appealed from can be set aside because of an insufficient answer. p. 16.
5. **ELECTION OF REMEDIES.—Acts Constituting Election.**—Where defendant's agents bought a car of lemons and shipped them to defendant, attaching draft to bill of lading, and delivered said bill of lading and the attached draft to the plaintiff, who, relying on a written guaranty of the defendant to pay all drafts drawn by said agents when presented, advanced the amount of said draft to said agents, and afterwards, on the refusal of defendant to accept the lemons and pay the draft, turned the draft and bill of lading back to said agents with directions to sell the lemons and apply the proceeds to the payment of the draft, such would not constitute an election of remedies and would not estop the plaintiff from afterwards collecting from the defendant the balance of the money advanced on said draft. p. 16.
6. **APPEAL.—Presumption.—Trial.—General Verdict.—Interrogatories.**—In an action to recover money advanced on a draft drawn on defendant by his agents for the price of a car of fruit purchased pursuant to a telegram from defendant reading "Buy car San Diego extra choice lemons, \$2.18, of new crop," the said advancement of money having been made by plaintiff on the written guarantee of defendant to pay all drafts drawn on him by his agents for cars of fruit that they are authorized to purchase for

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spot cash, evidence was admissible within the issues to show that the terms of said purchase were indicated by letters and telegrams other than that set out, and for the purpose of reconciling a general verdict for plaintiff with answers to interrogatories not showing the terms of the purchase to be for cash, it will be presumed that such evidence was introduced. p. 17.

7. TRIAL.—*Instructions.—Withdrawal.—Sufficiency.*—An instruction that “the instructions heretofore given you in this cause are now withdrawn and the court gives to you the following instructions on which you are to decide this case,” was a sufficient withdrawal of the instructions and no error can be predicated on any instruction so withdrawn. p. 18.

8. TRIAL. — *Instructions.—Sufficiency.*—Instructions directing the jury to find for the plaintiff if certain facts enumerated therein are proved, but which fail to enumerate certain other facts proof of which was necessary to a recovery by plaintiff, are erroneous. p. 19.

9. APPEAL. — *Harmless Error.—Instructions.—Verdict.—Interrogatories.*—Where from the answers to interrogatories it affirmatively appears that erroneous instructions did not influence the result, such errors will be treated as harmless. p. 20.

10. GUARANTY.—*Drafts.—Guaranty of Payment.—Burden of Proof.*—Before a recovery can be had by plaintiff in an action for money advanced on an unaccepted draft pursuant to the drawee’s guaranty of payment, it must establish the execution and delivery of such guaranty by a fair preponderance of the evidence. p. 21.

11. APPEAL.—*Harmless Error.—Instructions.*—Where the delivery of the defendant’s guaranty of payment of a draft is established by the undisputed evidence, or its delivery is admitted by him, the failure of the court to include the question of delivery of such guaranty as one of the facts to be established to entitle plaintiff to a verdict, in an action for money advanced on said draft, is not reversible error. pp. 21, 22.

12. GUARANTY.—*Delivery of Instrument.—Possession.*—Possession of a written guaranty by the party in whose favor it is made is prima facie evidence of its delivery. p. 21.

13. APPEAL.—*Harmless Error.—Correct Result.*—Where the result reached is clearly right under the evidence the judgment will not be reversed on account of an erroneous instruction. p. 22.

From Sullivan Circuit Court; *Charles E. Henderson*, Judge.

Action by the First National Bank of Redlands against Charles H. Goldsmith. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

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W. T. Douthitt and L. D. Leveque, for appellant.

Alexander G. Cavins, Alvin M. Higgins, John T. Hays, Will H. Hays and Eugene C. Campbell, for appellee.

LARRY, C. J.—This action was brought to recover \$970.50, paid by appellee to H. K. Pratt & Sons upon a draft drawn by them upon the appellant. Appellee was a corporation engaged in banking at Redlands, California, and appellant was a fruit merchant at Terre Haute, Indiana. H. K. Pratt & Sons were commission merchants at Redlands. On July 29, 1901, H. K. Pratt & Sons made a draft on appellant for the sum of \$970.50, payable to appellee, and attached it to a bill of lading for a carload of lemons. Said bill of lading showed that H. K. Pratt & Sons were both consignors and consignees of said car, and it contained directions requiring that notice of the arrival of said car at Terre Haute be given to appellant. H. K. Pratt & Sons indorsed said bill of lading as follows: "Deliver this B. L. to C. H. Goldsmith on payment of draft attached, H. K. Pratt & Sons," and delivered said bill of lading and the attached draft to appellee at its place of business. Appellee then paid to H. K. Pratt & Sons the sum of \$970.50. The authority under and by virtue of which appellee claims to have made such payment, and by virtue of which it seeks to hold appellant, is in writing as follows:

"Terre Haute, Indiana, 12-28-1900.

First National Bank,
Redlands, California.

Gentlemen: I guarantee to pay, when presented, all drafts, bills of lading attached, drawn on us by H. K. Pratt & Sons for cars of fruit we may authorize them to purchase for spot cash for our account. We authorize them to inspect, buy and ship at our risk, all spot cash orders, and drafts covering such purchases will be paid without recourse or delay. We well understand that any benefits derived from these terms comes to us and our money pays for the same.

Yours truly,

Charles H. Goldsmith."

Appellant admits that he signed said writing, but denies under oath that he delivered it. When the car arrived at Terre Haute, appellant refused to accept it, and also refused to pay the draft. After some controversy, appellee authorized H. K. Pratt & Sons to ship the car to another place, and to sell the fruit, and, after paying expenses, to pay the proceeds of said sale to appellee.

The action was tried on the issues of fact formed by a complaint in five paragraphs, answer in five paragraphs, and reply in general denial. The first question pre-

1. sented for our decision arises on the action of the trial court in overruling a demurrer for want of facts to each paragraph of the complaint. Appellee claims that the same complaint to which this demurrer is addressed has been held sufficient by this court in a former appeal (*First Nat. Bank v. Goldsmith* [1907], 40 Ind. App. 592). If this is true, such ruling, whether right or wrong, became the law of this case, and will be applied throughout the entire proceedings. *Linton Coal, etc., Co. v. Persons* (1896), 15 Ind. App. 69; *Lillie v. Trentman* (1891), 130 Ind. 16.

Appellant does not contend that the amended complaint, which is questioned by demurrer in this appeal, is different from the one to which the answer was addressed in

2. the former appeal; but his contention is, that its sufficiency was not directly called in question on the former appeal, and that it was not necessary for the court on such former appeal to consider or determine its sufficiency in order to decide the question directly presented. If the question directly presented for decision on the former appeal of this case, did not require the court to pass on the sufficiency of such amended complaint, then, anything which the court may have said in an attempt to decide such question would be *obiter dictum*, and would not have the effect to determine the question so as to make it the law of the case. *Davis v. Krug* (1884), 95 Ind. 1; *Union School Tp. v. First Nat. Bank, etc.* (1885), 102 Ind. 464.

However, if the question of the sufficiency of the complaint was actually determined, and, if such determination was necessary to a decision of any question directly presented for decision by such appeal, then the sufficiency of the complaint is settled as a part of the law of the case, and cannot again be questioned in any subsequent stage of the proceeding.

This court in its opinion on the former appeal used the following language: "It was held by the trial court that in the present action facts are set out sufficient to bind the appellee and to constitute a cause of action against him. The holding is correct." It thus appears that the language of the opinion indicates that the amended complaint states facts sufficient to constitute a cause of action. If it was necessary to determine this question in order to decide the question directly presented to the court for decision in that appeal, then the sufficiency of the amended complaint has been settled as the law of the case. The former appeal was prosecuted by the plaintiff to reverse a judgment rendered against it in the trial court. The record on said appeal shows the filing of the amended complaint, and also the filing of the answer thereto, and that a demurrer to such answer had been overruled. The record also shows that the plaintiff refused to reply or plead further, and judgment was rendered against it. The only error assigned was that the trial court erred in overruling the demurrer to the third paragraph of answer, and we are now called on to decide whether, in the decision of the question thus presented, it was necessary for the court to determine the question of the sufficiency of the complaint to withstand a demurrer for want of facts.

The trial court had held that the paragraph of answer in question stated facts sufficient to constitute a defense to the cause of action stated in the complaint. This court on the former appeal reversed the judgment and held that said paragraph of answer did not state facts sufficient to

constitute a cause of defense. It is well settled that

3. the demurrer searches the record, and that a bad answer is sufficient for a bad complaint. No answer, however defective, can be insufficient when addressed to an insufficient complaint. The judgment appealed from

4. in the first appeal could not have been reversed by this court, even though it found that the answer was insufficient, unless it also found that such answer was addressed to a paragraph of complaint sufficient to withstand a demurrer. *Bowen v. Striker* (1885), 100 Ind. 45; *State, ex rel., v. Emmons* (1882), 88 Ind. 279; *Vert v. Voss* (1881), 74 Ind. 565; *Board, etc., v. Stock* (1894), 11 Ind. App. 167; *Alkire v. Alkire* (1893), 134 Ind. 350.

We therefore conclude that it was necessary for this court in the former appeal to determine the question of the sufficiency of the amended complaint to withstand a demurrer for want of facts, and that the decision of the court as to that question became the law of the case, and is controlling. We accordingly hold that the trial court committed no error in overruling the demurrers to the several paragraphs of complaint.

Appellant claims that in two particulars the answers to interrogatories are in irreconcilable conflict with the general verdict. The first claim is that the interrogatories

5. show that the act of appellee, authorizing Pratt & Sons to ship the fruit to another place and sell it, after appellant had refused to accept it and pay the draft, amounted to an election of remedies. It is insisted, on behalf of appellant, that the relations existing between appellant and appellee were such as to give rise to two inconsistent remedies, and that by pursuing the one, appellant lost the other. From a consideration of the answers to the interrogatories, the pleadings, and the general verdict in this case, we cannot say that appellee had two inconsistent remedies. The evidence may have shown, and the jury may have correctly found, that the firm of Pratt & Sons was the

agent of appellant, and, as such agent, bought the carload of lemons for the price for which the draft was made, and shipped them to appellant. If the jury so found, then the title to such lemons passed to appellant at the time they were purchased, and the money advanced on the draft by appellee was received by appellant at the time it was received by his agents. The jury may have also found that the money was advanced by appellee solely on the faith of the written guaranty of appellant, and that the bill of lading was attached to the draft only for convenience of appellant and his agents. If, under such circumstances, the bank turned back the bill of lading to appellant's agents when appellant refused to accept the fruit, and if the agents of appellant sold the fruit and paid the proceeds of such sale, after deducting expenses, to appellee, this we think would not constitute an election of remedies, and would not estop appellee from afterward collecting from appellant the balance of the money which it had advanced to his agents.

It is further claimed by appellant that the answers to interrogatories affirmatively show that Pratt & Sons had no authority from appellant to purchase the carload of lemons, except the authority contained in a telegram, and that such telegram did not authorize them to buy for spot cash. The telegram referred to was as follows: "Buy car San Diego extra choice lemons \$2.18, of new crop." This telegram does not indicate the terms on which the firm of Pratt & Sons was to make the purchase. Evidence was admissible within the issues to show that the terms of the purchase were indicated by letters and telegrams other than that set out. For the purpose of reconciling the answers to interrogatories with the general verdict, we must presume that such evidence was introduced. There was no error in overruling appellant's motion for judgment on the answers to interrogatories.

Appellant complains of certain instructions given by the

trial court, which he insists are erroneous and prejudicial.

The first one complained of is designated as instruction seventeen, first series. It appears from the record that the court gave to the jury a series of instructions, and that the jury retired to deliberate on its verdict, and after about four hours' deliberation the jury requested that the instructions be again read to it. The judge directed that the jury be brought into court, and when this was done, gave a series of instructions in writing, designated in the briefs as the "second series." Before reading the second series, the court instructed the jury that all instructions previously given were withdrawn. The instruction was in writing, and is as follows: "The instructions heretofore given you in this cause are now withdrawn, and the court gives to you the following instructions on which you are to decide this case." It is insisted, on behalf of appellant, that the language used by the court was not sufficient to constitute a withdrawal of the instructions previously given, inasmuch as it did not admonish the jury to disregard them in arriving at its verdict. Such a caution would have been proper, but we think that the language used was clearly sufficient to indicate to the jury that it was to decide the case from a consideration of the instructions then given and that it should not consider those given previously. No error can be predicated on any instruction contained in the first series.

Objections are pointed out to a number of instructions contained in the second series given by the court. We have examined the charge as a whole, and, in the main, it may be said that the jury was fully and fairly advised as to the law applicable to the case. But some of the instructions contain inaccuracies and misstatements of the law, and it remains to be considered whether these were so material and prejudicial to appellant as to warrant a reversal of the case.

Appellant relies principally on errors assigned upon the giving of the third and thirteenth instructions. Instruc-

tion three is as follows: "It is the theory of the
8. plaintiff in this case that defendant Goldsmith executed to it the written guaranty mentioned in these instructions, and that the carload of lemons mentioned in the complaint was purchased by said H. K. Pratt & Sons as agents for Goldsmith, and that the plaintiff paid the draft mentioned in the complaint, with the bill of lading for said car attached. The burden is upon the plaintiff to show by a preponderance of the evidence, (1) that said H. K. Pratt & Sons were authorized by the defendant Goldsmith to make the purchase for him; (2) that H. K. Pratt & Sons did make the purchase for the defendant of the character specified in said written instrument just read to you as exhibit "A"; (3) that the fruit was ready for forwarding; (4) that the plaintiff paid the draft in suit under and relying upon the bank guaranty; (5) that a demand was made upon him for the payment of said draft, which was refused. Should the plaintiff prove these material allegations, then it would be your duty to find for the plaintiff, and it would make no difference to you whether the fruit was rotten, or whether it was new or old, or what not, nor the condition in which it arrived at Terre Haute. Nor would it make any difference as to whether or not an honest and fair inspection was made by Pratt & Sons in California."

Instruction thirteen is as follows: "If there has been any evidence introduced upon the theory that in the fruit business in California there were different terms used, one called the 'usual terms' and the other the 'spot cash' method of buying fruit, and further disclosed that when it is bought to be inspected at its destination it is called the 'usual terms' and when it is bought on inspection at once in California to be paid for immediately upon inspection and delivery, it is called the 'spot cash terms,' and further discloses that there is a difference in the price between the two methods, the spot cash being the cheaper, then I instruct you that if the evidence in this case discloses, by a preponderance thereof, that

the car of fruit in controversy was bought by Pratt & Sons as the agents of defendant on spot cash terms—that is payment on inspection and delivery at the place of purchase—and was paid for by the check of Pratt & Sons as the agents of defendant, and that thereupon said Pratt & Sons, as the agents of defendant, drew the draft in controversy upon Goldsmith with the bill of lading attached for the car of fruit so bought, and that the plaintiff advanced the money on the draft and the bill of lading under and pursuant to the written guaranty in these instructions mentioned, and that Pratt & Sons had authority to so buy the same, and a demand for payment of the draft was made by plaintiff on defendant and he refused, then I instruct you that defendant would be liable for the face of the draft with interest thereon from date of demand at the rate of six per cent. from demand.”

As the objections presented to these two instructions raise practically the same question, they will be considered together. Both of these instructions direct the jury to

9. find for the plaintiff if certain facts enumerated therein are proved, and both fail to enumerate certain facts, proof of which was necessary before plaintiff could be entitled to a verdict in his favor. These instructions were therefore clearly erroneous; but, when considered in connection with the answers to interrogatories and the evidence in the case we do not think that the error was such as requires a reversal. It is claimed by appellant, that in addition to the facts enumerated in the instructions under consideration, it was necessary, before a verdict could be rightly returned for the plaintiff, that the following facts be found: (1) That the draft referred to was drawn by Pratt & Sons; (2) that said draft was drawn for a carload of fruit purchased by Pratt & Sons for appellant; (3) that appellant ordered the fruit purchased for spot cash; (4) that the alleged bank guaranty was executed by delivery. The jury by answers to interrogatories found that the draft

was made by Pratt & Sons, and that it represented the cost of a carload of lemons, with a commission of five cents a box added; that Pratt & Sons bought said lemons for appellant, and appellant authorized them to buy such lemons for spot cash. As all of these facts were found by the jury adversely to appellant, it is very evident that the general verdict would not have been changed if these instructions had enumerated these facts, and required that they should be found as a prerequisite to a recovery. If the answers to interrogatories show affirmatively that an error complained of did not influence the result, such error will be treated as harmless. *Southern Ind. R. Co. v. Norman* (1905), 165 Ind. 126; *Terry v. Davenport* (1908), 170 Ind. 74; *Cleveland, etc., R. Co. v. Osgood* (1905), 36 Ind. App. 34; *Brinkman v. Pacholke* (1908), 41 Ind. App. 662.

The fourth objection presents a similar question. Under the issues, the burden was on plaintiff to prove the execution of the bank guaranty, and it could not recover

10. unless the fact of delivery was established by a preponderance of the evidence. If the evidence on this question was conflicting, the jury should have been left to decide, and it was reversible error to instruct the jury that it might return a verdict in favor of appellee, without

11. first deciding in its favor the question of delivery.

But if the delivery of the written guaranty was admitted by appellant, or if the delivery is established by the undisputed evidence, then a failure on the part of the court to submit such question to the jury, and require a finding thereon favorable to plaintiff as a condition prerequisite to a verdict in its favor, will not be treated as reversible error. *Tomlinson v. Briles* (1835), 101 Ind. 538.

To our mind the delivery to appellee of the written guaranty marked exhibit A is established by the undisputed evidence. The writing shows on its face that it was

12. dated December 28, 1900. The cashier of the bank operated by appellee testified that said writing was

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in the possession of said bank on the second or third day of January, 1901, and two members of the firm of Pratt & Sons testified that they saw it in the possession of the bank. Possession of the written instrument by the party in whose favor it is made is *prima facie* evidence of delivery. *Garrigus v. Home, etc., Soc.* (1891), 3 Ind. App. 91, 50 Am. St. 262; *Brooks v. Allen* (1878), 62 Ind. 401.

In addition to this, a paragraph of answer, at one time filed in this case by appellant and afterward withdrawn,

was introduced in evidence, in which appellant ex-

11. pressly admitted the execution of said writing. Ap-

pellant did not go upon the witness stand to deny such delivery, and there is not a particle of evidence in the record which tends to prove that said guaranty was not delivered. The evidence on the question of delivery was all on one side. There was no conflicting evidence for the jury to consider or weigh, and only one conclusion could be directly drawn from the undisputed evidence. Under such circumstances, the failure of the instruction under consideration to include the question of delivery of the guaranty as one of the facts which plaintiff must establish in order to entitle him to a verdict, is not reversible error. Where

13. the result reached is clearly right under the evidence,

the judgment will not be reversed on account of an erroneous instruction. §700 Burns 1908, §658 R. S. 1881; *Pittsburgh, etc., R. Co. v. Higgs* (1906), 165 Ind. 694, 4 L. R. A. (N. S.) 1081; *Indianapolis St. R. Co. v. Schomberg* (1905), 164 Ind. 111.

What has been said in discussing the instructions we have considered, we think, disposes of the objections urged to the other instructions. Without giving to each a separate consideration, it is sufficient to say that the mistakes and inaccuracies complained of were not of such a character as would be likely to mislead the jury, and the result indicates that the jury was not misled thereby.

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The evidence is amply sufficient to sustain the verdict.
Judgment affirmed.

NOTE.—Reported in 96 N. E. 503. See, also, under (1) 3 Cyc. 401; (2) 3 Cyc. 400; (3) 31 Cyc. 128, 338; (4) 31 Cyc. 340; (5) 15 Cyc. 260; (6) 3 Cyc. 313; (7) 38 Cyc. 1787; (8) 38 Cyc. 1632; (9) 38 Cyc. 1815; (10) 20 Cyc. 1989; (11) 38 Cyc. 1640; (13) 3 Cyc. 385. As to contracts of guaranty, see 105 Am. St. 502. As to election of remedies, see 1 Am. St. 626; 10 Am. St. 487.

WALLING ET AL. v. SCOTT.

[No. 7,310. Filed November 17, 1911. Rehearing denied February 16, 1912. Transfer denied March 28, 1912.]

1. **CONVERSION.—Directions in Will.—Realty and Personalty.**—Where a will directs land to be sold and converted into money, courts of equity will deal with the land as personalty. p. 25.
2. **CONVERSION.—Directions in Will.—Sufficiency of Directions.**—Where there is such a blending of the real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both real and personal estate and bequeath the fund as money, it will be sufficient to work an equitable conversion of the real estate into money. p. 25.
3. **WILLS.—Directions in Will.—Power of Sale.—Failure to Designate by Whom Sale shall be Made.**—Where a testator directs that his real estate be sold without declaring by whom the sale shall be made, the power of sale is not defeated, but rests in the executor, or administrator with the will annexed. p. 25.
4. **WILLS.—Directions in Will.—Power of Sale.—Sale after death of Executor.**—Where the sale provided for in a will can not take place until the death of the executor, the administrator with the will annexed may properly make the sale. p. 26.
5. **CONVERSION.—Directions in Will.—Power of Sale.—Time.**—Where the will directed that all the property after payment of testator's debts should go to the wife during her life, and that all remaining in her possession at her death should be sold and the proceeds distributed among testator's heirs, an equitable conversion of the property took place at testator's death, although the time of sale and actual conversion was to be at the death of the life tenant. p. 26.
6. **WILLS.—Construction.—Nature and Character of Property Devised.**—One claiming property under a will must take it in the character impressed upon it by that instrument. p. 26.

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7. **PARTITION.—Right of Action.—Provisions of Will.—Conversion.**—Where land is equitably converted into money by a direction in a will that it should be sold after the death of the life tenant and then distributed, the heir of a beneficiary who died before the termination of the life estate could only share in the proceeds of the sale of such land and could not have partition thereof. p. 27.
8. **CONVERSION.—Provisions of Will.—Reconversion.**—Where a will directs a conversion of real estate into money to be divided among a number of beneficiaries, a reconversion may be had by agreement of all the beneficiaries, but one beneficiary may not reconvert his share without the consent of the others. p. 27.
9. **PARTITION.—Right of Action.—Intention of Testator.—Statute.**—Partition of lands contrary to the intention of a testator is forbidden by §1247 Burns 1908, §1190 R. S. 1881. p. 28.
10. **WILLS.—Transfer of Property in Consideration of Love and Affection.**—Property devised or bequeathed by will is not property given or transferred in consideration of love and affection within the meaning of §2997 Burns 1908, §2473 R. S. 1881. p. 29.

From Morgan Circuit Court; *Joseph W. Williams*, Judge.

Suit by Lafayette Scott against Mary E. Walling and John E. Walling, her husband, Dora A. Gentry, Lydia J. Tudor and Everett Tudor, her husband. From a decree for plaintiff, defendants appeal. *Reversed.*

George W. Grubbs, D. E. Watson and James W. Harper, for appellants.

C. G. Renner, J. C. McNutt and A. M. Bain, for appellees.

IBACH, J.—John B. Johnson, who died in 1880, by one clause of his will left to his wife all of his property, both real and personal, that should be left after all his legal debts were paid, to have, hold and use during her life. A later clause was as follows: "My said wife, Malissa Johnson, shall pay all my legal debts out of such of my property as in her judgment will be most advisable, and at her death all remaining in her possession shall be sold and the proceeds equally divided between my bodily heirs, viz., Mary E. and Dora A., Lizzie I. and Lydia J. Johnson." He appointed his wife executrix of his will. Appellee married Lizzie I. Johnson in 1894, and she died in 1895, leaving no descendant. The widow of John B. Johnson died on April 21, 1908,

and on May 4, 1908, appellee, as heir of his deceased wife, commenced this action in partition against the three living daughters, to have the land divided, basing his alleged right to a partition wholly on the clause just quoted from the will, and claiming that under this clause he and appellants were tenants in common in fee simple of the land. The trial court sustained him, and awarded the partition.

The question presented for our consideration is, Was appellee entitled to a partition of the land in suit?

Where a will directs land to be sold and converted into money, courts of equity deal with the land as personalty.

To bring about this equitable conversion there must,

1. however, be an adequate expression of an absolute intention that the land shall be sold and turned into money. And where there is such a blending of the real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both real and
2. personal estate, and bequeath the fund as money, such has been held to show an absolute intention as much as an absolute direction. 9 Cyc. 830, 831, 833; 7 Am. and Eng. Ency. Law 464, 465; *Craig v. Leslie* (1816), 3 Wheat. 563, 4 L. Ed. 460; *Rumsey v. Durham* (1854), 5 Ind. 71; *Nelson v. Nelson* (1905), 36 Ind. App. 331; *Comer v. Light* (1911), 175 Ind. 367.

John B. Johnson directed positively in his will that all his property remaining in the possession of his wife at her death should be sold, and the proceeds distributed

3. among his heirs, naming them. This included his real and personal property. He failed to designate some one by whom the sale should be made, but this did not defeat the creation of a valid power of sale. If a testator directs that his real estate be sold, without declaring by whom the sale shall be made, the power to sell rests in the executor, or administrator with the will annexed, if the duties imposed with reference thereto are such as are usually performed by an executor, or administrator with will

annexed. If no executor is named, the administrator with will annexed is the proper person to exercise the power of sale. *Davis v. Hoover* (1887), 112 Ind. 423; note to *Rankin v. Rankin* (1865), 87 Am. Dec. 205, 210, and authorities cited; note to *Crouse v. Peterson* (1900), 80 Am. St. 89, 105.

Since the sale provided for by the will of John B. Johnson could not take place until the death of the executrix

named therein, the administrator with will annexed

4. may properly make such sale. We conclude, therefore, that the direction in his will is sufficient to work an equitable conversion of his real estate into money.

Appellants concede that the interests of the beneficiaries vested at the testator's death. At this time the equitable

conversion took place, although the time of sale and

5. actual conversion was fixed by the will at a more or less remote and indefinite time, namely, at the death of the life tenant. 9 Cyc. 838.

Their interests vesting at the time of the testator's death, attached as personalty, for one claiming property under a

will must take it in the character impressed upon it

6. by that instrument. The beneficiaries here are not entitled under the will to the land itself, but to the proceeds of the land, and their interest is not an interest in real estate, but an interest in the proceeds of real estate, which by virtue of equitable conversion assumes the character of personal property, and maintains that character until the actual conversion, although in certain instances the rights of third parties may intervene and attach as of the character of real property. "Where no other rights intervene, or are asserted, the property will be treated, for the purpose of carrying out the terms of the will, as that character of property into which it is directed to be converted, not because it is such property, but because it is directed to be so treated, and dealt with, in carrying out the intention." *Comer v. Light, supra*, on petition for rehearing.

Appellee, who claims under the will as the heir of his wife, is not entitled to receive under it more than his wife would if living. From its terms, the beneficiaries can-

7. not claim the realty itself, but only share in its proceeds. Appellee's wife if living could share only in the proceeds of the sale of the real estate, and would have no right to ask for a partition. Appellee is not a "third party," and does not assert "other rights" within the meaning of those terms as used in the case of *Comer v. Light, supra*, and his right to share in the grant under the will does not attach to the land in its character of realty. He is not a claimant against his wife, but a claimant under his wife, asserting not the right of a third party, but the right which she herself held to the property in suit. Since he bases his claim on the provisions of the will, he can take no more than the will gives him, and the will gives to his wife's heirs no more than it would give to herself if living. The principle is well recognized, that "where land is equitably converted into money by a direction in a will that it should be sold after the death of the life tenant and then distributed, the share of a beneficiary who dies before the termination of the life estate passes as personalty." 9 Cyc. 851, and cases cited.

It is true that when a will directs real estate to be sold, and the proceeds to be divided among a number of beneficiaries, they may all agree to take the real estate in its original condition instead, thus reconverting it.

It is equally true that one of these beneficiaries may not elect to take his share in land without the consent of the others, for each one has a right under the will to a sale of the land, and to whatever advantages would accrue by a sale of the real estate in its undivided condition, and he cannot be deprived of this right without his consent. Since three of the beneficiaries under the will of John B. Johnson are opposing a partition, that partition cannot be granted. 9

Cyc. 856, and cases cited under note 27; *Brown v. Miller* (1898), 45 W. Va. 211, 31 S. E. 956; Page, Wills §719.

Also, a statute applicable to the present case
9. (§1247 Burns 1908, §1190 R. S. 1881), forbids the partition of land contrary to the intention of the testator.

From the reasoning before set out, it follows that appellee cannot maintain a suit for partition of the land involved in the present action against the consent of any of the beneficiaries who by the will are interested in its proceeds. Judgment reversed.

ON PETITION FOR REHEARING.

IBACH, P. J.—Appellee cites the case of *Bowen v. Swander* (1889), 121 Ind. 164, as holding that partition may be maintained by one of the devisees in the present case. The decision in that case goes no farther than to hold that all may maintain partition. In that case the question was not whether partition might be maintained, but whether certain of the parties had an interest in the property involved, and when that interest, if any, vested. The plaintiff there asked partition, and that his title be quieted. One defendant in a cross-complaint asked partition, and that her title be quieted. The other defendant in a cross-complaint claimed to be the owner of the whole property involved, and sought to have his title quieted. None of the parties was opposing partition of the real estate on the ground that it should be sold in an undivided condition, and its proceeds divided. Neither was the statute (§1247 Burns 1908, §1190 R. S. 1881) invoked in that case. Also, the will in the case of *Bowen v. Swander, supra*, merely directed real property to be sold and the proceeds divided, while the will in the present case directed that all the property remaining in his widow's possession be sold at her death; and the proceeds divided, thus creating a fund out of the proceeds of mixed personal and real property.

In the present case we hold that the will of John B. Johnson worked an equitable conversion of all his property into personalty at the time of his death, and that title to such property vested in the beneficiaries at that time, subject to the contingency that it might all be used by the widow during her life, that upon the authority of *Myers v. Carney* (1908), 171 Ind. 379, when appellant's wife died, her share, under the law of descents, went to her heirs; that her heirs had the same right under the will as she, that is, to share in the proceeds of the sale of all the property remaining in the possession of Malissa Johnson at her death, but not to compel partition of the real estate, against the wish of the other beneficiaries. The section of the law of descents controlling is §3027 Burns 1908, §2489 R. S. 1881, and we can conceive of nothing which would bring the case under any other provision of the statute. It is argued that §2997 Burns 1908, §2473 R. S. 1881, applies, but our conclusion is otherwise. Property devised

or bequeathed is not property given or transferred in

10. consideration of love and affection within the meaning of §2997, *supra*. Furthermore, said §2997 provides for the reversion to the donor of property transferred as a gift, or in consideration of love and affection, only in case the donor is living at the time the donee dies intestate without children or their descendants, and in this case the transfer was made by will, and not until after the death of the donor.

An administrator *de bonis non*, appointed under §2757 Burns 1908, §2395 R. S. 1881, would be empowered to sell all the property in the possession of Malissa Johnson at the time of her death, and to divide the proceeds among the living beneficiaries and the heirs of the one deceased. However, if the heirs can agree to a partition, there is nothing to prevent it.

Petition overruled.

NOTE.—Reported in 96 N. E. 481, 97 N. E. 388. See, also, under

Craven v. State, ex rel.—50 Ind. App. 30.

(1) 9 Cyc. 880; (3) 40 Cyc. 1823; (4) 40 Cyc. 1834; (6) 9 Cyc. 850. As to the conversion of real property into personal, and personal into real, by will, see 5 Am. St. 141. As to when an equitable conversion takes place under a will directing the sale of land at a future time, see 17 Ann. Cas. 643.

**CRAVEN ET AL. v. THE STATE, EX REL. WHITE,
ADMINISTRATOR, ET AL.**

[No. 7,536. Filed March 29, 1912.]

1. **DESCENT AND DISTRIBUTION.—***Debts of Intestate.—Liability of Heirs.*—An action brought by an administrator de bonis non, for and on behalf of the estate which he represents alone, to recover from the heir of an intestate for breach of a bond which said intestate signed as surety, cannot be maintained where it appears from the complaint that there has been no administration on the estate of said surety, and there are no averments with reference to any other debts against, or creditors of said estate. p. 33.
2. **LIMITATION OF ACTIONS.—***Accrual of Cause.—Administrator's Bond.*—Where the final settlement of an administrator is set aside and he is ordered by the court to file a new report and to pay into court for distribution the balance in his hands as such administrator, and he fails to comply with such order, and is removed by the court for such failure, the statute of limitations, as against a cause of action predicated on such breach of his bond, begins to run from the time of his removal by the court. p. 34.
3. **EXECUTORS AND ADMINISTRATORS.—***Removal.—Collateral Attack.—Presumption.*—The order or judgment of a court removing an administrator will be presumed to be correct as against collateral attack. p. 34.

From Johnson Circuit Court; *William E. Deupree*, Judge.

Action by The State of Indiana on the relation of John C. White, administrator *de bonis non* of the estate of Martha J. Handy, deceased, against Thomas W. Craven, James Marshall Works, and David Lamkin. From a judgment for plaintiff, the defendants Craven and Works appeal. *Affirmed in part, and reversed in part.*

Craven v. State, ex rel.—50 Ind. App. 30.

L. Ert Slack, Miller & Barnett, for appellants.

William Featheringill, for appellee.

HOTTEL, J.—This action was instituted by the relator, John C. White, administrator *de bonis non* of the estate of Martha J. Handy, deceased, against appellants Thomas W. Craven and James Marshall Works, and appellee David Lamkin, to recover on an administrator's bond. From a judgment against appellants for \$551.90 this appeal is prosecuted.

The assignment of errors questions the rulings on the joint and several demurrers to the complaint, on appellants' joint motion for a new trial, and on appellant James M. Works' separate motion for a new trial.

The complaint alleges that David Lamkin was on April 16, 1900, appointed administrator of the estate of Martha J. Handy, deceased, and gave bond as such in the sum of \$1,600, with Thomas W. Craven and James Works as sureties; that James Works died intestate on or about October 2, 1904, and left surviving him, as his only heir at law, his son, James Marshall Works, an appellant herein, who inherited all his property, consisting of personalty alleged to be of the probable value of \$1,000, and certain real estate which is described and alleged to be of the probable value of \$3,000; that no administration was had on his estate; that David Lamkin continued to act as such administrator until June 25, 1908, when he was removed from said trust, "without having made a full and final settlement of said estate, and without having paid the balance of the funds then in his hands into court, as ordered and directed by the court;" that thereafter, on June 25, 1908, John C. White, relator herein, was appointed administrator *de bonis non* of the estate of Martha J. Handy, deceased, and qualified as such; that about November 8, 1901, while David Lamkin was acting as administrator, there came into his hands the sum of \$475.13 of funds belonging to said estate, which sum he con-

verted to his own use, and for which he has failed and refused to account; that said sum, together with six per cent interest thereon from November 8, 1901, and damages for the detention thereof, together with ten per cent damages on said amounts, is now due said estate, and is wholly unpaid.

A copy of the bond is filed with the complaint as an exhibit, and judgment is demanded for \$1,000.

The answers to said complaint were (1) a general denial, (2) and (3) two and six years' statutes of limitation, respectively. Appellants in their brief present and discuss but five propositions, which are as follows:

(1) No right of action exists against an heir for the debt of the ancestor until administration has been had on the estate of such ancestor.

(2) An heir is only liable for the debts of his ancestor to the extent of the value of the property inherited from such ancestor.

(3) Suits for relief against frauds must be commenced within six years after the cause of action accrues.

(4) Sureties are not bound by judgments and decrees rendered against the principal, where such judgments or decrees are based on the agreements and admissions of the principal, and where such sureties are not parties to the suit or the agreement, as sureties are the favorites of the law.

(5) A decree entered by any person not elected or appointed a judicial officer is void.

The first two propositions are limited in their effect to appellant Works. It is insisted that the law announced in these propositions have the effect, (1) of rendering the complaint insufficient as against said appellant Works, and (2) that their application will require the granting of a new trial as to such appellant on account of the insufficiency of the evidence to sustain the decision of the court below.

The complaint affirmatively shows that the bond sued on was not executed by appellant Works, but that it was ex-

ecuted by his deceased father as one of the sureties
1. thereon, and that any right of action, if any, as
against such appellant, must be predicated on §2965
Burns 1908, §2442 R. S. 1881, and result from the aver-
ments that appellant Works is the sole heir of his deceased
father, that such decedent died intestate, and that appellant
inherited from him certain real estate particularly described,
and alleged to be of the probable value of \$3,000, and per-
sonal property of the probable value of \$1,000. The com-
plaint avers that “no administration was had upon his
estate,” viz., the estate of said Works, deceased.

Appellee White seeks a recovery for and on behalf of the
estate which he represents alone, and there are no aver-
ments in the complaint with reference to any other debts
against, or creditors of, said estate.

In construing §2965, *supra*, it has been expressly decided
by the Supreme Court that “a single creditor, suing for
himself alone, cannot maintain an action against the widow
and heirs on a promise of the deceased,” and that “a cred-
itor of a decedent’s estate must proceed to enforce his claim
against the estate through an executor or administrator, and
cannot sue the heirs, devisees and legatees, where there has
been no administration.” *Carr v. Huctte* (1881), 73 Ind.
378, 381. See, also, *Butler v. Jaffray* (1859), 12 Ind. 504,
511; *North-western Conference, etc., v. Myers* (1871), 36
Ind. 375, 378; *Wilson v. Davis* (1871), 37 Ind. 141, 144;
Leonard v. Blair (1877), 59 Ind. 510, 513; *Clevenger v.*
Matthews (1906), 165 Ind. 689, 692; *Fisher v. Tuller* (1890),
122 Ind. 31, 35.

These authorities force the conclusion that the court be-
low erred in overruling the demurrer of appellant Works to
the complaint.

Section 294, subd. 4, Burns 1908, §292 R. S. 1881, provid-
ing that suits for relief against fraud must be commenced
within six years after the cause of action accrues, relied

on in appellants' third proposition, can furnish no
2. aid nor relief to appellants under the facts of this case.

This was a suit on an administrator's bond. The proof shows that the principal in said bond, appellee David Lamkin, continued as such administrator until June 25, 1908, when he was removed by the court; that prior to his removal, to wit, on April 13, 1907, the court, in which said estate was being administered, set aside a former final settlement made by such administrator, and ordered him to file a new report within twenty days, and to pay into court, for distribution, the balance in his hands as such administrator; that said administrator failed to file such report and turn over to the court such balance then in his hands; that on account of such failure he was removed as such administrator, and his successor, the relator herein, appointed. It is upon this breach of said bond that this suit is predicated. In such case the cause of action does not accrue until the breach of the bond is committed. *Moore v. State, ex rel.* (1909), 43 Ind. App. 387, 394; *Lambert v. Billheimer* (1890), 125 Ind. 519.

The record in this case presents no question to which the principles announced in appellants' propositions four and five, or the authorities cited thereunder, are applicable.

No question is here presented or argued as to the
3. admissibility of the judgment or order of court introduced in evidence, showing the removal of said administrator, and the mere fact that such judgment or order may have been based in part on an agreement of facts, and that it was rendered by some judge other than the regular judge, could not in any event entitle appellants to a new trial, on the ground that the decision of the court is not sustained by sufficient evidence. Such order or judgment will be presumed to be correct as against collateral attack, even where the question of its admissibility as evidence is properly presented.

We find no error in the record, other than the overruling of appellant Works' separate demurrer to the complaint. It follows, therefore, that as to appellant Thomas W. Craven the judgment should be, and is, affirmed, and that as to appellant Works the judgment should be, and is, reversed, with instructions to the court below to sustain his demurrer to the complaint, and for such other proceedings as the parties may desire to take, not inconsistent with this opinion.

It is further adjudged that appellee pay half the costs made in the court below from and after the overruling of said demurrer of appellant Works to said complaint, and half the costs of appeal, and that all other costs be paid by appellant Craven, this judgment for costs, of course, in no way to affect the judgment of the court below, holding appellee Lamkin, as principal in said bond, primarily liable for all the costs of the action adjudged in that court.

NOTE.—Reported in 97 N. E. 1021. See, also, under (1) 14 Cyc. 211; (2) 18 Cyc. 1288; (3) 18 Cyc. 171. As to when the statute of limitations commences to run against an executor or administrator, see 89 Am. Dec. 394.

WATKINS v. FORKNER.

[No. 7,559. Filed March 29, 1912.]

1. **ELECTIONS.—Recount.—Undertaking for Costs.—Jurisdiction.—Dismissal of Petition.**—The filing of a sufficient undertaking for costs is a condition precedent in a proceeding to recount votes under §§6990, 6991 Burns 1908, §§4738, 4739 R. S. 1881, and until it is filed the court is without authority to grant the prayer of the petition and the same may be dismissed for want of jurisdiction. p. 37.
2. **ELECTIONS. — Recount. — Appeal.—Jurisdiction.**—The Appellate Court acquires no jurisdiction on appeal from a judgment dismissing a petition for recount of votes where it appears from the record that the lower court had no jurisdiction to grant the relief prayed. p. 37.

Watkins v. Forkner—50 Ind. App. 35.

3. ELECTIONS.—*Recount.—Acquiescence in Result.—Dismissal of Appeal.*—Where it appears that pending an appeal from a judgment dismissing a petition for a recount of votes, the successful candidate resigns, and the contestant acquiesces in the result of the election by becoming a candidate to fill the vacancy, the appeal will be dismissed. p. 37.

From Henry Circuit Court; *Will M. Sparks*, Special Judge.

Action by James L. Watkins against Mark E. Forkner to contest election. From a judgment of dismissal, contestant appeals. *Dismissed.*

E. A. Nation, H. G. Yergin, Brown & Beard, for appellant.

Eugene H. Bundy, N. Guy Jones, for appellee.

FELT, C. J.—Appellant, James L. Watkins, has wholly ignored the rules of this court in the preparation of his brief. Appellee, Mark E. Forkner, calls attention to this fact, but supplies in his brief much that should have appeared in appellant's brief.

On December 17, 1909, appellant filed in the Henry Circuit Court his verified petition, in which he alleged, in substance, that on December 13, 1909, appellant and appellee were candidates for the office of mayor of the city of New Castle; that appellant desires to contest said election, and honestly believes there was a mistake made and fraud committed in the official count of the ballots cast for said office; that he desires a recount of all said ballots, including all contested or thrown out ballots.

Prayer for the appointment of three commissioners, and all proper relief. No other pleading was filed by appellant.

Proof that due notice of the filing of said petition was served on appellee was made on December 21, 1909, and thereupon appellee, by his attorneys, entered a special appearance, and moved to dismiss said petition, for the following reasons: (1) That there is no law in force authorizing the proceedings; (2) the court has no jurisdiction on the

subject-matter of the action or of the parties to the proceeding.

The motion to dismiss was sustained, the petition dismissed, and judgment was rendered accordingly.

The assignment relied on is that the court erred in sustaining the motion to dismiss the petition for a recount of the ballots.

The proceeding is not an election contest, but appellant contends that he is entitled to a recount under §§6990, 6991 Burns 1908, §§4738, 4739 R. S. 1881.

Appellee claims these sections have been repealed by later acts, and are no longer in force. But assuming, without deciding, that they are in force, the lower court was justified in dismissing appellant's petition.

Section 6991, *supra*, after providing when and how such petition may be filed, concludes by stating that "upon his furnishing a written undertaking, with sufficient free-
1. hold surety, that he will pay all the costs of such recount, the court or judge shall grant the prayer of said petition and order said recount to be made." Until such undertaking was filed the court was not authorized to grant the prayer of the petition, and properly dismissed it for want of jurisdiction. The record does not show the filing of any undertaking for costs, and the statute makes this a condition precedent to the right to have commissioners appointed to recount the ballots. This conclusion makes it unnecessary to decide whether the statute relied on is in force.

The record shows that the circuit court did not
2. have jurisdiction to grant the relief prayed for by appellant. This court, therefore, has acquired no jurisdiction.

Furthermore, pending the consideration of the cause in this court, appellee has filed his verified motion to
3. dismiss the appeal, on the ground that Mark E. Forkner did, on September 6, 1910, resign the office of may-

or of said city; that his resignation was duly accepted; that appellant, James L. Watkins, thereupon became a candidate before the common council for election as mayor, and was voted for by some members thereof for election to fill the unexpired term of said Forkner.

It thus appears that appellee has long since ceased to hold the office of mayor; that appellant acquiesced in and recognized the election of appellee to said office; that his resignation caused a vacancy in the office to which appellant sought election.

The controversy has therefore resolved itself into a moot question, which alone would compel a dismissal of the appeal under the well-established rules of this Court and our Supreme Court.

As this Court has not acquired jurisdiction, and the controversy has resolved itself into a moot question, the appeal is dismissed.

NOTE.—Reported in 97 N. E. 1020. See, also, under (1) 1913 Cyc. Ann. 1784; (2) 2 Cyc. 537; (3) 3 Cyc. 188. For a discussion of the resignation of the contestee as a defense to a proceeding to contest an election, see Ann. Cas. 1912D 265.

DONEY v. LAUGHLIN.

[No. 6,976. Filed May 12, 1911. Rehearing denied December 20, 1911. Transfer denied March 29, 1912.]

1. STATUTES.—*Construction.—General Rules.*—Statutes *in pari materia*, and those on the same general subject not strictly *in pari materia*, should be construed together when necessary to ascertain and carry into effect the legislative intent, and §7463 Burns 1908, Acts 1901 p. 104, requiring commission contracts for the sale of real estate to be reduced to writing, should be construed in connection with various sections of the statute of frauds. p. 40.
2. STATUTES.—*Construction.—Intention of Legislature.*—In determining the intention of the legislature in enacting a statute, we may look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, the mischief intended to be remedied and to all like and kindred matters. p. 41.

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3. **STATUTES.—Construction.—Meaning of Words.—“Void” and “Invalid.”**—The words “void” and “invalid,” when used in regard to contracts not immoral nor against public policy, usually mean voidable at the option of one of the parties or some one legally interested therein. p. 42.
4. **CONTRACTS.—Sale of Real Estate.—Commission Contracts.—Statute.—Construction.**—Under §7463 Burns 1908, Acts 1901 p. 104, providing that no contract for the payment of a commission for the sale of real estate shall be valid unless the same shall be in writing, such contract is not invalid because it was not reduced to writing before the services were performed. p. 44.
5. **CONTRACTS.—Sale of Real Estate.—Commission Contracts.—Sufficiency.**—An instrument properly dated and signed, reciting that “for services rendered or commission” to the agent, “for selling my farm, paid on same \$100. Balance \$150. I agree to pay” to said agent, “due on or before February 1, 1908,” is sufficient under §7463 Burns 1908, Acts 1901 p. 104. p. 45.
6. **CONTRACTS.—Sale of Real Estate.—Commission Contracts.—Description of Land.—Statute.—Evidence.**—§7463 Burns 1908, Acts 1901 p. 104, does not provide that an agreement to pay a commission for the sale of real estate shall contain a description of the real estate, and in an action on such contract parol testimony may be admitted to enable the court to properly apply the contract to the subject-matter. p. 45.
7. **CONTRACTS.—Sale of Real Estate.—Commission Contracts.—Time of Execution.**—Where a seller of real estate received the benefit of services of an agent who negotiated the sale, and thereafter executed his obligation in writing to pay the agent, such instrument though executed after the sale sufficiently meets the requirements of §7463 Burns 1908, Acts 1901 p. 104. p. 46.

From Wayne Circuit Court; *Henry C. Fox*, Judge.

Action by George A. Doney against Abram W. Laughlin. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Charles E. Shively and *Ray Karr Shively*, for appellant.

Abel L. Study and *Robert L. Study*, for appellee.

FELT, J.—Suit on a written instrument for the collection of a commission for the sale of real estate. Demurrer to the first paragraph of amended complaint, for insufficiency of the facts alleged, sustained, and on refusal to plead further, judgment was rendered against appellant, from which this

appeal was taken, and the ruling on the demurrer is the error relied on for reversal.

The complaint alleges, in substance, that appellant is a real estate agent, and in 1907, at the special instance and request of appellee, sold certain real estate belonging to him; that on December 19, 1907, after said services were rendered, they had a settlement, and agreed upon \$250 as the amount due from appellee for said services, and appellee then and there paid thereon the sum of \$100, and executed the following written instrument:

“Cambridge City, Indiana, 12, 19, 1907. For services rendered or commission to Geo. A. Doney, of \$250 for selling my farm, paid on same \$100. Balance \$150, I agree to pay said Doney, due on or before February 1, 1908.”

Appellee failed and refused to pay said sum of \$150, which is due and unpaid.

The principal questions discussed relate to the sufficiency of the written instrument to meet the requirement of the statute, and to the time of its execution. Section 7463 Burns 1908, Acts 1901 p. 104, reads as follows: “That no contracts for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative.”

Statutes *in pari materia*, and those on the same general subject not strictly *in pari materia*, should be construed together when necessary to ascertain and carry into ef-

1. fect the legislative intent. Section 7463, *supra*, should be construed in connection with the various sections of our statute of frauds. *Conn v. Board, etc.* (1898), 151 Ind. 517, 525; *United States Sav., etc., Co. v. Harris* (1895), 142 Ind. 226, 231; *Board, etc., v. Marion Trust Co.* (1902), 30 Ind. App. 137, 140.

In determining the intention of the legislature in enacting a statute, we may look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, the mischief intended to be remedied, and to all like and kindred matters.

Board, etc., v. Board, etc. (1891), 128 Ind. 295, 298; *Hunt v. Lake Shore, etc., R. Co.* (1887), 112 Ind. 69, 75.

It is contended by appellee that the statute, requiring that commission contracts for the sale of real estate must, to be valid, be reduced to writing, cannot be satisfied unless the agreement is reduced to writing before the services are rendered; that in the absence of such writing preceding the rendition of the services, the agreement is absolutely null and void, and a subsequent written contract on the subject is without consideration and void. On the other hand, it is contended by appellant that a verbal contract for a real estate commission, not being immoral nor against public policy, and a sale by an agent being such a transaction, that in the absence of the statute and independent of any express contract the law would imply an obligation on the part of the seller to pay for the fair and reasonable value of beneficial services. The verbal agreement is not void in the strict and extreme meaning of that word, and the services rendered thereunder afford an equitable consideration sufficient to support a subsequent written contract on the same subject. On slightly varying facts and similar statutes, it is beyond question that there is apparent authority for both of these positions, and hence the necessity of construing the statute, and especially the word "valid", to determine and make effective the legislative intent.

Section 7855 Burns 1908, §5119 R. S. 1881, provides that suretyship contracts of married women are void as to them, but our courts have uniformly held that such contracts are voidable and not void, and that a married woman, to obtain the benefit of the statute, must plead coverture and surety-

ship. *Lackey v. Boruff* (1899), 152 Ind. 371, 377; *Shirk v. Stafford* (1903), 31 Ind. App. 247, 251.

In construing our statute declaring that usurious contracts are void as to the usurious interest, such contracts are held to be only voidable *pro tanto*. *Studabaker v. Marquardt* (1876), 55 Ind. 341, 347; *Lemmon v. Whitman* (1881), 75 Ind. 318, 329, 39 Am. Rep. 150.

It has been held that the words "void" and "invalid", when used in regard to contracts not immoral nor against public policy, usually mean voidable at the option of

3. one of the parties, or some one legally interested therein, and that such construction leads to fewer errors than that which ascribes to those words the meaning of absolute nullity for any and all purposes. *State v. Richmond* (1853), 26 N. H. 232; *Mutual Benefit Life Ins. Co. v. Winne* (1897), 20 Mont. 20, 49 Pac. 446; *Pearsoll v. Chapin* (1862), 44 Pa. St. 9; *Ewell v. Daggs* (1883), 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682; *Kearney v. Vaughan* (1872), 50 Mo. 284; 8 Words and Phrases 7334, 7335.

In the case of *Ewell v. Daggs*, *supra*, on page 150, the court, by Justice Matthews, said: "A distinction is made between acts which are *mala in se*, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are *mala prohibita*, which are void or voidable, according to the nature and effect of the act prohibited."

It has also been held that "if it concerns the public good, it is generally to be considered void; but if it is prohibited for the purpose of securing the private rights of the parties interested, it is only voidable. Where the public interest is not concerned, it is sufficient to allow the party who may be prejudiced by an unlawful sale or contract to avoid it." *Mutual Benefit Life Ins. Co. v. Winne*, *supra*. See, also, *Fletcher v. Stone* (1825), 3 Pick. 250; *Veeder v. McKinley-Lanning Loan, etc., Co.* (1901), 61 Neb. 892, 86 N. W. 982,

986; *Van Schaack v. Robbins* (1873), 36 Iowa 201; *Denny v. McCown* (1898), 34 Or. 47, 54 Pac. 952.

Our statute of frauds (§7462 Burns 1908, §4904 R. S. 1881) provides that no action shall be brought in certain cases, unless the contract, or some memorandum or note thereof, is in writing, and such obligations have uniformly been held to be voidable and not void. This section, being §1 of the act of 1852, clearly relates to the remedy and proof, and not to the contract itself; but the mischief sought to be remedied is practically the same as that of the statute relating to real estate commission contracts. *Shierman v. Beckett* (1882), 88 Ind. 52; *Day v. Wilson* (1882), 83 Ind. 463, 43 Am. Rep. 76; *Wills v. Ross* (1881), 77 Ind. 1, 40 Am. Rep. 279; *Riley v. Haworth* (1903), 30 Ind. App. 377; *Washington Glass Co. v. Mosbaugh* (1898), 19 Ind. App. 105; *Lowman v. Sheets* (1890), 124 Ind. 416, 7 L. R. A. 784.

Section 7474 Burns 1908, §4915 R. S. 1881, being §12 of the act of 1852, provides that certain conveyances shall be void. Section 7479 Burns 1908, §4920 R. S. 1881, being §17 of the act of 1852, provides likewise; but the conveyances therein declared void are not absolutely void for all purposes, but may be avoided, on the conditions specified in the statute, at the suit of the injured party. *Kitts v. Willson* (1892), 130 Ind. 492; *Kitts v. Willson* (1895), 140 Ind. 604; *Whitney v. Marshall* (1894), 138 Ind. 472.

In the case of *Wiggins v. Keizer* (1855), 6 Ind. 252, 257, the court quoted from the case of *Wennall v. Adney* (1802), 3 Bos. & Pul. 247, as follows:

“An express promise can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not

barred by any legal maxim or statute provision.” *Wills v. Ross, supra*, 7; *Comstock v. Coon* (1893), 135 Ind. 640, 643; *Mohr v. Rickgauer* (1908), 82 Neb. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533; *Stout v. Humphrey* (1903), 69 N. J. L. 436, 55 Atl. 281; *Freeman v. Robinson* (1876), 38 N. J. L. 383, 20 Am. Rep. 399; *Drake v. Bell* (1899), 55 N. Y. Supp. 945.

The object of the legislature in enacting the statute requiring real estate commission contracts to be in writing was in general, the same as that which led to the enactment of our statute of frauds, viz., to avoid frauds and perjuries, and the later is especially for the protection of those selling real estate through agents, to avoid conflict as to who, if any one, is entitled to the commission, and definitely to fix the amount to be paid. In enacting the statute, the legislature plainly provides that a contract for a real estate commission is invalid, or incapable of legal enforcement, unless in writing signed by the person obligated or his authorized agent. But this enactment did not change the character of the services rendered, and it still remains beneficial to the person whose real estate is sold, and, but for the statute, such verbal agreement is legally enforceable. If the services were rendered without any express agreement, either oral or written, the law but for the statute would imply an obligation on the part of the seller, to pay therefor, if he accepts the benefits of the services, and such implied obligation could be enforced by suit, in the absence of the statute.

Under the foregoing authorities, this equitable consideration, arising out of the transaction, is sufficient to support a written contract binding the person, for whom the

4. sale is made, to pay for the services, and such writing is not invalid because executed after the services are rendered.

In Browne, Stat. of Frauds (5th ed.) §352a, it is said: “As to the time when the memorandum must be executed, it is settled that it may be at any time subsequent to the for-

mation of the contract by the parties, and before action brought." See, also, Browne, Stat. of Frauds (5th ed.) §§337, 338, 343; *Townsend v. Kennedy* (1894), 6 S. Dak. 47, 60 N. W. 164, 166; *Morse v. Crate* (1892), 43 Ill. App. 513; *Williams v. Bacon* (1854), 2 Gray (Mass.) 387; *Mohr v. Rickgauer, supra*; *Bird v. Munroe* (1877), 66 Me. 337, 22 Am. St. 571; *White v. Dahlquist Mfg. Co.* (1901), 179 Mass. 427, 60 N. E. 791; *Bailey v. Sweeting* (1861), 99 Eng. Com. Law (9 C. B. R. N. S.) *843.

The instrument set out with the complaint is sufficient in form and in substantial compliance with the requirements of the statute. It is signed by the party ob-

5. ligated, shows when and to whom payment is to be made, the nature of the services rendered, and fixes the amount due. *Zimmerman v. Zehendner* (1905), 164 Ind. 466; *Isphording v. Wolfe* (1905), 36 Ind. App. 250; *Price v. Walker* (1909), 43 Ind. App. 519, 522; *Phillips v. Jones* (1907), 39 Ind. App. 626; *Gaines v. McAdam* (1898), 79 Ill. App. 201, 208; *First Presbyterian Church v. Swanson* (1901), 100 Ill. App. 39, 43.

It has been held that parol testimony may be admitted to enable the court properly to apply the contract to the subject-matter. This does not change or modify the

6. terms of the agreement, but makes possible an intelligent application of it to the subject of the contract. As our statute does not provide that the agreement shall describe the real estate to be sold, and as in this case the instrument was written after the sale, it is not insufficient for failing so to do, and the reference thereto in the agreement is sufficient on the facts of this case. *Wills v. Ross, supra*, 13; *Ransdel v. Moore* (1899), 153 Ind. 393, 401, 53 L. R. A. 753; *Howard v. Adkins* (1906), 167 Ind. 184, 188; *Warner v. Marshall* (1906), 166 Ind. 88, 107.

In examining the decisions both of this court and the Supreme Court, we find no holding, as appellee's counsel contend, that the execution of the writing must precede the

rendition of the services. While this is the usual order, and the courts have, in discussing other questions, used language recognizing, in a sense, this order, the question has not been previously presented nor decided in Indiana, and such remarks indicate nothing more than an incidental following of the usual order of procedure in such transactions. Our courts have held, and we adhere strictly to the conclusion, that under our present statute the collection of a commission for the sale of real estate cannot be legally enforced unless the contract is in writing duly signed by the vendor or his authorized agent.

The numerous cases dealing with questions kindred to the one before us, arising under the statute of frauds, have not been in entire harmony. Our statute of frauds, enacted in 1852 (1 R. S. 1852, p. 299), is patterned largely after the English statute of Charles II. The fourth section of that act provides that no action shall be brought in certain specified instances, unless the agreement, or some memorandum thereof, be in writing, signed by the party to be charged, or by his lawful agent. The seventeenth section provides "that no contract for the sale of any goods, wares and merchandise for the price of £10 sterling or upwards, shall be allowed to be good," except upon receipt of same, or some earnest or part payment, or there be some note or memorandum in writing signed by the parties to be charged, or their authorized agents.

The first and sixth sections of our statute of frauds (§§7462, 7468 Burns 1908, §§4904, 4909 R. S. 1881) are similar to §4 of the statute of Charles II, and §§7, 8, 10, 12, 17 and 18 (§§7469, 7470, 7472, 7474, 7479, 7480 Burns 1908, §§4910, 4911, 4913, 4915, 4920, 4921 R. S. 1881) are in form somewhat similar to §17 of the statute of Charles II.

In the case of *Leroux v. Brown* (1852), 74 Eng. Com. Law (12 C. B. R.) *801, it was held that the fourth section did not affect the validity of the contract, but only the proof of it, and that the seventeenth section went to the

existence of the contract and made it void unless executed in conformity with the statute. But in the case of *Bailey v. Sweeting, supra*, when considering the seventeenth section, a different conclusion was reached and the court said on page 859: "The effect of that enactment, is, that, although there is a contract which is a good and valid contract, no action can be maintained upon it, if made by word of mouth only, unless something else has happened, *ex. gr.* unless there be a note or memorandum in writing of the bargain signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract."

The language just quoted was used with reference to a sale made in July, 1859, for which the note or memorandum was not executed until December 3, following, and after the receipt of a part and the rejection of a part of the goods sold. To the same effect, both as to the effect of §17 and the time of executing the note or memorandum, is the case of *Sievwright v. Archibald* (1851), 79 Eng. Com. Law (17 Q. B.) *103, *114. In the later cases of *Britain v. Rossiter* (1879), 11 Q. B. D. 123, and *Maddison v. Alderson* (1883), 8 App. Cas. 467, it was said, though not essential to the questions decided, that there is no difference in the effect of the two sections.

Browne, Stat. of Frauds (5th ed.) §115, in discussing the fourth and seventeenth sections, after noting the difference in phraseology, says: "There seems to be no reason to attribute to the latter phraseology any force, or to draw from it any inferences, different from those which attend the construction of the former. 'Allowed to be good' appears to mean, considered good for the purposes of recovery upon it."

To the same effect is Anson, Contracts (8th Am. ed.) 87.

In *Townsend v. Hargraves* (1875), 118 Mass. 325, the supreme court of Massachusetts, in construing a statute sim-

ilar to the seventeenth section of the English statute, in which the words employed were, "shall be good and valid," said: "It is true there is difference in phraseology in these sections; but in view of the policy of the enactment, and the necessity of giving consistency to all its parts, this difference cannot be held to change the force and effect of the two sections. * * * The validity intended is that which will support an action on the contract. * * * In carrying out its purpose, the statute only affects the modes of proof as to all contracts within it."

In 1897, the legislature of Nebraska passed an act providing that commission contracts for the sale of lands between the owner and his agent shall be void unless in writing signed by the owner, describing the land and setting forth the compensation.

In *Mohr v. Rickgauer* (1908), 82 Neb. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533, the supreme court of that state held that while no recovery could be had upon an oral contract under this statute, if after receiving the benefit of services, the seller of the real estate executes a promissory note in payment for the services of the agent, rendered in pursuance of an oral agreement, the note was supported by good and valuable consideration and was collectible.

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In *Zimmerman v. Zehendner, supra*, the court had under consideration a question arising out of an effort to incorporate a commission contract into the contract of sale, by stating therein, "and to compensate his authorized agents * * * to the amount that has been and is now understood." The court rightfully held this mere reference or memorandum insufficient, and in so doing said: "The material part of the agreement—the amount of the compensation—is still left in uncertainty and undetermined." The court also said that "a written memorandum" acknowledging an oral contract was insufficient, but does not say a writing containing all the essentials of the contract, duly signed, would be insufficient. The same is true of *Phillips*

v. *Jones, supra*, and it is to be observed that in each of these cases the memorandum or reference is, and was rightfully held to be, insufficient as a contract, but though both instruments were executed after part or all of the services were rendered, no objection is urged or suggested on that account.

The case of *Krohn v. Bantz* (1879), 68 Ind. 277, is urged as holding that the verbal agreement is absolutely void, and that there is no consideration for the subsequent written agreement.

This case arose under the seventh section of our statute of frauds, providing that no contract for the sale of goods of the value of \$50 or over shall be valid unless part of the property is received, part payment made, some memorandum given, etc. There was a parol sale of hogs for future delivery, and a nonnegotiable promissory note for \$100, due in thirty days, executed by the purchaser and delivered to the seller on the day the agreement was made. Suit for damages for failure to deliver the hogs. The court held that as the note was not a memorandum nor a contract of sale, it did not comply with the statute, and, being nonnegotiable, did not amount to part payment or an earnest binding the sale, and that there was no consideration supporting the note. The suit in that case was for the breach of a contract, that for want of the proof required by the statute, the party was unable to show existed.

In the case at bar the seller of the real estate, according to the averments of the complaint, actually received the benefit of the services, and thereafter duly executed his obligation in writing, thus meeting the requirements of the statute. The case at bar comes squarely within the rule, that in the absence of an express contract the law will imply an obligation for benefit received, and the statute does not change the beneficial character of the service, but only requires an obligation in writing duly signed. This satisfies the purpose of the statute in preventing frauds and perjuries, and in fixing

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definitely the amount of a real estate commission and to whom due.

We conclude that appellant's complaint stated a cause of action, and that it was error to sustain the demurrer thereto.

Judgment reversed, with instruction to overrule the demurrer to appellant's complaint, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 94 N. E. 1027. See also, under (1) 36 Cyc. 1147; (2) 36 Cyc. 1110, 1128; (3) 36 Cyc. 1114; 40 Cyc. 215; (4) 18 Cyc. 220; (5) 19 Cyc. 219; (6, 7) 19 Cyc. 220. For a discussion of the right of a real estate broker to recover commissions under an oral contract of employment when a statute requires a written contract, see 13 Ann. Cas. 977. As to the necessity that agent's authority to purchase or sell real property be in writing to enable him to recover compensation for his services, see 9 L. R. A. (N. S.) 933. As to the power of the legislature to require contracts for commissions for finding a purchaser for real estate to be in writing, see 33 L. R. A. (N. S.) 973.

McFERRAN ET AL. v. SWAYNIE.

[No. 7,538. Filed April 2, 1912.]

1. **JUSTICES OF THE PEACE.—Execution.—Claims of Third Persons to Property Levied On.—Remedy.**—Where personal property is seized by virtue of an execution, and a person other than the execution defendant owns or has some interest in it, he may have his right thereto tried and determined, as provided by §1820 Burns 1908, §1529 R. S. 1881, by filing with the justice of the peace issuing such writ his verified complaint stating the nature of such claim, and under §1837 Burns 1908, §1546 R. S. 1881, if he is a resident of this state and fails to assert his claim within twenty days after receiving from the officer seizing the property, a notice as provided by §1836 Burns 1908, §1545 R. S. 1881, he is thereafter barred from doing so, unless before receipt of such notice, he has instituted a suit to assert his right. p. 52.
2. **REPLEVIN.—Action by Third Person to Recover Property Levied On.—Parties Defendant.**—Where an execution plaintiff assumed control of the writ issued on a judgment had before a justice of the peace and directs the officer as to its execution, he is a proper party defendant with the officer in an action brought by a third person to replevy the property levied on. p. 53.

3. **JUDGMENT.—Arrest of Judgment.—Overruling Motion.**—Where the complaint stated a cause of action against all defendants, and the verdict and judgment was against all of them, and no error appeared on the face of the record sufficient to vitiate the entire proceedings, the court properly overruled defendant's several motions in arrest of judgment. p. 53.
4. **COURTS.—Jurisdiction.—Superior Court.—Action to Replevy Property Taken on Execution Issued by Justice of the Peace.**—Where an execution plaintiff assumed control of an execution issued on a judgment had before a justice of the peace and directed the constable in making a levy, an action in replevin against the execution plaintiff and the officer, by one claiming to be the owner of the property levied on, was properly brought in the superior court. p. 55.
5. **OFFICERS.—Constable.—Levying Execution by Deputy.—Liability.**—Where an execution was levied by the deputy of a constable in the name of and by virtue of the authority vested in such constable, the levy was the act of the constable, and a verdict for plaintiff in an action against such constable and the execution plaintiff to replevy the property levied on will not be disturbed because the evidence fails to show that such constable was personally active in making the levy. p. 55.

From Carroll Circuit Court; *James P. Wason*, Judge.

Action by Lydia J. Swaynie against J. Dale McFerran and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Charles E. Thompson and *Rochester Baird*, for appellants.

Charles R. Pollard and *Charles E. Luke*, for appellee.

MYERS, J.—This was an action in replevin brought by appellee against appellants in the Superior Court of Tippecanoe County. On change of venue the cause was sent to the Carroll Circuit Court, where the issues were submitted to a jury, and a verdict returned that appellee was the owner and entitled to the possession of the property described in the complaint, stating its value and assessing damages in her favor.

The separate motion of each appellant for a new trial, assigning as reasons in support thereof that the verdict of

the jury is not sustained by sufficient evidence, and that it is contrary to law, also their separate motions in arrest of judgment, were overruled, and judgment rendered in favor of appellee and against appellants in accordance with the verdict, except as to the damages, which appellee remitted. These assignments of error, and the reasons in support thereof, cover the field of discussion and points made by counsel.

Briefly stated, it is the theory of appellants that the facts in this case bring it within the provisions of §§1820, 1836, 1837 Burns 1908, §§1529, 1545, 1546 R. S. 1881, and as appellee failed to pursue the remedy thus given, she was barred from thereafter asserting any claim to the property.

Under §1820, *supra*, where personal property is seized by virtue of an execution, and a person other than the execution defendant owns or has some interest in it, he may

1. have his right thereto tried and determined, by filing with the justice of the peace issuing such writ a complaint verified by affidavit stating the nature of such claim.

And under §1836, *supra*, the officer seizing property on an execution issued by a justice of the peace, which he has reason to believe is not owned by the execution defendant, or that another person has some claim to it, may give such person notice in writing, stating the facts required by this section, and if the person so notified be a resident of this State, and does not assert his claim in the manner provided by §1820, *supra*, within twenty days, as provided by §1837, *supra*, he is thereafter barred from doing so, unless, before receipt of such notice, such claimant has instituted suit to assert his right. *Patterson v. Snow* (1900), 24 Ind. App. 572, 57 N. E. 286.

This court, on a consideration of these sections of the statute, held that it "was evidently the intention of the legislature to provide an exclusive remedy for the recovery of property where the action is against the officer alone." *Wright v. Shelt* (1898), 19 Ind. App. 1, 48 N. E. 26. In the

case at bar, the execution plaintiff was made a party
2. defendant along with the officers, principal and deputy, serving the writ. Under such circumstances, the case last cited holds that the case of *Firestone v. Mishler* (1862), 18 Ind. 439, is in point. In that case the question was, whether the plaintiff, in an action of replevin for personal property taken in an action in attachment, was confined to the proceeding to try the right of property according to the particular sections of the statute, "or whether he was also entitled to resort to the ordinary proceeding in the nature of replevin." The court held, that the remedy thus given "was intended to protect the officer, who acted in good faith, and purchasers at sales under such proceedings; that so far as the plaintiff in the writ is concerned, it is merely cumulative." In that case the point was also made that the attachment plaintiff was not a proper party. It appeared there, as here, that the attachment plaintiff had assumed control of the writ, and directed the officer as to its execution. Under these circumstances, it was held that the plaintiff in the attachment action was a proper party.

The complaint is in the ordinary form, and contains the usual allegations in cases of replevin. To this complaint appellants separately answered by a general denial, and by affirmative facts in bar of the action. No question is presented on these answers, consequently we give them no further attention.

The complaint states a cause of action against all the appellants, and the verdict and judgment being against all of them, and no error appearing on the face of the
3. record sufficient to vitiate the entire proceedings, no error intervened in overruling the several motions in arrest. *Boor v. Lowrey* (1885), 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Paddock v. Watts* (1888), 116 Ind. 146, 18 N. E. 518, 9 Am. St. 832; *Westfield Gas, etc., Co. v. Abernathy* (1893), 8 Ind. App. 73, 35 N. E. 399.

The remaining questions relate to the sufficiency of the

evidence. Was the execution plaintiff a proper party defendant? Does the evidence support the verdict?

From the evidence, practically undisputed, it appears that in March, 1909, appellant McFerran, before James Davidson, a justice of the peace, in Fairfield township, Tippecanoe county, Indiana, recovered a judgment for \$75.65 and costs against William Miller and John R. Swaynie. On March 20, 1909, said justice issued an execution on said judgment, and delivered the same to appellant John Tankersley, a duly qualified and acting constable of said township, who thereafter delivered the same to his duly appointed and authorized deputy, appellant Job H. Killen, who, on April 27, by virtue of said writ, seized and took into his possession, as the property of John R. Swaynie, the horses which are the subject of this action. At the time the horses were so seized, they were hitched to a breaking plow in charge of Charles Swaynie, a son of appellee, who was engaged in plowing on her farm. When Killen made the levy, he was accompanied by the execution plaintiff McFerran, Harry Baugh, who testified that one-half of the judgment belonged to him, and Mr. Crockett, an attorney. McFerran and Baugh assisted Killen in removing the horses from the farm to a barn in the city of Lafayette, in which McFerran kept his horses, and where Killen left them. On the same day, but after the levy, appellee notified Killen and the parties so assisting him that the horses belonged to her, and demanded that they be released to her, all of which was refused. On April 27, and after the demand aforesaid, appellant Tankersley, by his deputy, Killen, gave appellee notice in writing, stating the facts as to the levy, etc., as required by §1836, *supra*. On April 28, 1909, this suit was commenced, and a writ of replevin issued to the sheriff of Tippecanoe county, who, on the next day—April 29—pursuant to said writ, took possession of said horses. On April 30 appellant McFerran gave bond as required by law in such cases, and the sheriff delivered the horses to him. Since that time McFerran sold one of

the horses for \$120. Appellee is the wife of the execution defendant, John R. Swaynie, and a resident of this State.

There is evidence from which the jury was authorized to find that appellee, prior to the rendition of said judgment, was, and ever since that time has been, the owner of said horses, and entitled to their possession. There is also evidence tending to prove that the execution plaintiff, McFerran, assumed control of, and directed the officer in making the levy on the property in question, and that all of appellants were acting together, with the ultimate purpose and common object of satisfying said judgment and costs by sale of the horses in due course, on execution.

Under this evidence, according to the authorities

4. cited, the execution plaintiff was a proper party, and the superior court had jurisdiction.

As to appellant Tankersley, it is true the evidence does not show that he was personally active in this matter, except through the medium of his duly appointed and qualified deputy. The levy in question and the notice given to appellee were acts done in the name of, and by virtue of the authority vested in Tankersley as a duly appointed, qualified and acting constable of Fairfield township. It was his act, but executed by another. When appellee made her demand for the horses, and, as the evidence shows, tried to take them by force, Killen and his associates interfered, and prevented her from retaking them. We cannot say that either the verdict of the jury, or the judgment is not supported by satisfactory evidence.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 135. See, also, under (1) 17 Cyc. 1201; (2) 34 Cyc. 1425; (3) 23 Cyc. 824; (5) 35 Cyc. 1618. As to parties defendant in actions of replevin, see 80 Am. St. 751. As to the right to maintain replevin for goods seized under process against another, see 7 Ann. Cas. 907; 11 Ann. Cas. 302.

WEBSTER v. BLIGH.

[No. 7,561. Filed April 2, 1912.]

1. **APPEAL.—Briefs.—Failure of Appellant to Comply With Rules of Court.—Right of Appellee.**—Where the appellant's brief does not substantially comply with the rules of court, the appellee is not required to supply the omissions of appellant, nor to submit a brief on the merits, but he has a right to assume that the rules will be enforced. pp. 57, 58.
2. **APPEAL.—Judgment.—Presumption.—Burden of Showing Error.**—On appeal every presumption is indulged in favor of the correctness of the judgment of the trial court, and the appellant has the burden of showing error therein, which he must do in the manner prescribed by the rules of the court. p. 58.
3. **COURTS.—Rules.—Effect.**—When rules of court are adopted and published, they have the force and effect of law, and are obligatory upon the court, as well as upon the parties to causes pending before it. p. 58.
4. **APPEAL.—Briefs.—Statement of Evidence.—Failure to Comply with Rules of Court.**—Where appellant made no effort to set out the evidence in his brief in the manner required by clause five of rule twenty-two of the court, but under the head of "The Facts" gave a history of the case from its inception, made up of the conclusions of counsel as to what the evidence was, together with comments and argument, no question on the evidence was thereby presented. p. 59.

From Cass Circuit Court; *John S. Lairy*, Judge.

Suit by Martin J. Bligh against Weldon Webster. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Long, Yarlott & Souder and *Weldon Webster*, for appellant.

Lairy & Mahoney, for appellee.

ADAMS, J.—This appeal is prosecuted from a judgment decreeing the specific performance of a written contract for the conveyance by appellant to appellee of certain real estate in the city of Logansport. Error is predicated on the action of the trial court in overruling appellant's motion for a new trial, and in overruling his motion to modify the judgment.

In considering the errors assigned and relied on for reversal, it is necessary to have recourse to the evidence offered at the trial.

Appellee insists that no question is presented to this court for determination, for the reason that appellant has failed to set out in his brief a condensed recital of the evidence in narrative form, presenting the substance clearly and concisely.

It is shown by appellant's brief that there was a written contract between the parties, dated October 17, 1907, but neither the contract nor the substance thereof appears in the brief. A letter from appellant to appellee, dated April 27, 1908, is set out, wherein appellant made to appellee a certain, definite proposition for the settlement of the differences between them. It appears that this letter ratified the contract of October 17, 1907, with certain modifications. The brief also sets out a letter from appellee's attorney, showing an unqualified acceptance of the proposition as modified. Many other letters subsequently written, and relating to this matter, are referred to, but are not set out in the brief.

No effort was made to set out the evidence in narrative form, as required by clause five of rule twenty-two of this court. In lieu thereof appellant, under the head of "The Facts," has given a history of the case from its inception, made up of the conclusions of counsel as to what the evidence was, together with comments and argument.

Appellee in his brief has not supplied the omis-

1. sions, and relies on his objection to the brief, without discussing the merits of the appeal. This was the clear right of appellee, under the decisions of the Supreme Court and this court.

The brief of appellee specifically points out the failure of appellant to observe the rules of court in the preparation of his brief, and appellant was fully advised of the nature of the objection urged. He did not seek to amend the same in

the particulars complained of, but, instead, filed an interesting and entertaining reply brief on the general subject of rules.

When an appeal is taken to this court, every presumption is indulged in favor of the correctness of the judgment of the trial court. The burden is on appellant to show

2. error in the decision and judgment appealed from, and the error complained of must be specifically pointed out, substantially in the manner provided by the rules. This court will not search the record for errors on which to reverse a judgment. Until appellant has

1. substantially complied with the rules, there is no occasion for appellee to submit a brief on the merits of the case. He is not required in his brief to supply omissions in the brief of appellant. He has a right to assume that the rule requiring appellant to set out the evidence in narrative form will be uniformly enforced.

In *Magnuson v. Billings* (1899), 152 Ind. 177 at page 180, 52 N. E. 803, the court said: "A rule of court is a law of practice, extended alike to all litigants who come

3. within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights, as well as to secure the prompt and orderly despatch of business." In the same case it is held that when rules are adopted and published, they have the force and effect of law, and are obligatory on the court, as well as on the parties to causes pending before it. *Welch v. State, ex rel.* (1905), 164 Ind. 104, 107, 72 N. E. 1043; *Barricklouw v. Stewart* (1904), 163 Ind. 438, 441, 72 N. E. 128; *Pittsburgh, etc., R. Co. v. Wilson* (1904), 161 Ind. 701, 66 N. E. 899; *Boseker v. Chamberlain* (1903), 160 Ind. 114, 66 N. E. 448; *Security, etc., Assn. v. Lee* (1903), 160 Ind. 249, 66 N. E. 745; *Liebole v. Traster* (1908), 41 Ind. App. 278, 287, 83 N. E. 781; *Rush v. Kelley* (1905), 34 Ind. App. 449, 73 N. E. 130; *Albaugh Bros., etc., Co. v. Lynas* (1911), 47

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Ind. App. 30, 93 N. E. 678; *Price v. Swartz* (1912), 50 Ind. App. 627, 97 N. E. 938; *Ireland v. Huffman* (1909), 172 Ind. 278, 88 N. E. 508.

In the last case cited the court said, "Counsel refers to certain facts that were testified to by witnesses, and certain other facts that were not testified to, and supplements the statements with certain conclusions of his own as to what the evidence established. But this is not a compliance with the rule. That which is required by the rule is the substance of what the witnesses have said in giving their testimony."

In the case at bar there was no such compliance

4. with the rule of court as to present any question on the evidence.

The judgment is affirmed.

Lairy, J., not participating.

NOTE.—Reported in 98 N. E. 73. See, also, under (2) 3 Cyc. 275; (3) 11 Cyc. 742; (4) 1913 Cyc. Ann. 222. As to the effect of rules of court, see 41 Am. St. 643.

CAL HIRSCH & SONS IRON AND RAIL COMPANY v. PERU STEEL CASTING COMPANY.

[No. 7,371. Filed December 15, 1911. Rehearing denied April 4, 1912.]

1. APPEAL.—*Waiver of Error*.—An assignment of error is waived by failure to make any argument or to cite any authority in support thereof. p. 61.
2. APPEAL.—*Motion for New Trial*.—*Briefs*.—*Waiver of Error*.—An assignment of error in overruling a motion for a new trial is waived, unless the motion or its substance is set out in appellant's brief. p. 62.
3. CONTRACTS.—*Requisites*.—*Offer and Acceptance*.—A contract is created by an offer and acceptance, and the acceptance must be unconditional and in the terms of the offer. p. 67.
4. SALES.—*Contract by Correspondence*.—*Intention of Parties*.—*Construction of Letter*.—Where plaintiff offered to sell defendant five hundred tons of melting scrap steel at a certain price per ton

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delivered, and in its letter in reply thereto defendant stated that it had decided to give "an order for sample car subject to our approval of the five hundred tons mentioned some time ago," and that the order "is given on condition that you can make immediate shipment of the sample car, for if the scrap does not prove satisfactory we will want to have time to investigate sources of supply elsewhere," the fact that the order was expressly limited to a sample car would indicate that there was no intention at that time to order more, and the letter cannot be construed as an agreement to accept and pay for five hundred tons if the sample car proved satisfactory. pp. 67, 68.

5. EVIDENCE.—*Writing.—Intention of Parties.*—If the words of a writing clearly express the intention of the writer, such intention will prevail and extraneous evidence cannot be admitted to show a contrary intention. pp. 68, 70.
6. APPEAL.—*Insufficiency of Evidence.—Statute.*—Under §698 Burns 1908, Acts 1903 p. 338, a direct assignment of error questioning the sufficiency of the evidence to sustain the verdict is unavailing, that section being applicable only to cases not triable by jury. p. 71.
7. APPEAL.—*Insufficiency of Evidence.—How Question Presented.*—In cases triable by jury the question as to the sufficiency of the evidence can be presented on appeal only by assigning as one of the causes for a new trial that the verdict or decision is not sustained by sufficient evidence, and then assigning as error the action of the trial court in overruling the motion for a new trial. p. 71.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Cal Hirsch & Sons Iron and Rail Company against the Peru Steel Casting Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

A. L. Hirsch, Antrim & McClintic, for appellant.

Charles A. Cole and Albert H. Cole, for appellee.

LAIRY, J.—Appellant, as plaintiff, sued appellee in the Miami Circuit Court to recover damages for the breach of an alleged contract for the sale of 500 tons of melting scrap steel, at the agreed price of \$20.50 per ton. The complaint was in six paragraphs. The first paragraph counted on an executed sale in writing by plaintiff to defendant of 500 tons of melting scrap steel, at the price of \$20.50 per gross

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ton, alleging that a portion of the same had been accepted and paid for at the agreed price, and that defendant refused to accept the remainder. The second paragraph is identical with the first, except that it counted on an executory contract of sale, instead of an executed one. The third paragraph counted on a parol contract for a sale of the same material, and, for the purpose of taking the contract out of the operation of the statute of frauds, alleged facts to show a partial delivery and acceptance by defendant. The fourth paragraph is identical with the third, except that it counted on an executory, instead of an executed parol contract. The fifth and sixth paragraphs were based on an account for \$11 for freight paid by appellant, but as there was no evidence introduced in support of either of these paragraphs, they will not be further considered.

Appellee demurred separately to each paragraph of the amended complaint. The demurrer was sustained as to the first and second, and overruled as to the remaining paragraphs. Issues were formed on this complaint, and the case submitted to a jury, which returned a verdict in favor of appellee. Appellant filed a motion for a new trial which was overruled, and the court rendered judgment in favor of appellee and against appellant for costs. Appellant assigns the following errors: (1) The court erred in sustaining the demurrer of appellee to the first paragraph of appellant's amended complaint filed February 5, 1909; (2) the court erred in sustaining the demurrer of appellee to the second paragraph of appellant's amended complaint filed February 5, 1909; (3) the court erred in overruling appellant's motion for a new trial; (4) the judgment appealed from is not fairly supported by the evidence; (5) the judgment appealed from is clearly against the weight of the evidence.

Appellant has waived the first error assigned, by

1. failing to make any argument or to cite any authority in support thereof. *Hamilton v. Hanneman* (1898),

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20 Ind. App. 16, 50 N. E. 43; *Delaware, etc., Tel. Co. v. Fiske* (1907), 40 Ind. App. 348, 81 N. E. 1110.

Appellant has waived the third error assigned, by a failure to set out in its brief a copy of the motion for a new trial, or to set out the substance of said motion. It is im-

2. possible for any judge of this court, not in possession of the record, to know from an examination of appellant's brief, what causes were assigned in its motion for a new trial. This court cannot consider a specification of error, unless the brief of appellant contains a concise statement of so much of the record as fully presents the error relied on. Rule 22, Clause 5, of Supreme and Appellate Courts; *Springer v. Bricker* (1905), 165 Ind. 532, 76 N. E. 114; *Kilmer v. Moneyweight Scale Co.* (1905), 36 Ind. App. 568, 76 N. E. 271. In order to raise any question presented by the motion for a new trial, it is necessary for the appellant to set out said motion in his brief, or to state its substance.

By the second assignment of error, the action of the trial court, in sustaining the demurrer of appellee to the second paragraph of appellant's amended complaint, is presented for review. This paragraph of complaint, after alleging that both plaintiff and defendant are corporations, is as follows: "Plaintiff further says that during the month of July, 1903, and for some time prior thereto, it was engaged in buying, handling and selling scrap melting steel, and said defendant during said time was engaged in the manufacture of steel castings; that with a view of procuring a purchaser for its goods and merchandise said plaintiff on the 2d day of July, 1903, opened a correspondence with said defendant, which correspondence consisting of letters and telegraph messages, continued for some time, and as a result of said correspondence together with the interpretation put upon said correspondence by the plaintiff and defendant which interpretation as shown by letters and telegrams of both plaintiff and defendant, copies of which are herein set out,

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and by their actions, plaintiff avers that on, to wit, the 17th day of August, 1903, said plaintiff by the agreement in writing, which written agreement consists of the letters and telegraph messages of which copies are hereafter set out in this paragraph of its complaint, promised and agreed that it would sell and deliver to said plaintiff pursuant to its instruction five hundred tons of twenty-two hundred and forty (2,240) pounds per ton of heavy melting scrap steel, for which said defendant in said written agreement promised and agreed to pay to plaintiff, the sum of \$20.50 per gross ton of twenty-two hundred and forty pounds per ton f. o. b. cars Peru, Indiana. Copies of which letters and telegraph messages comprising and constituting said written contract are as follows, to wit:”

“Peru Steel Casting Co., Peru, Indiana. 7/2/03

Dear Sirs:—Are you in the market for 500 tons of heavy melting steel? Please let us hear from you and oblige.

Yours truly,

Cal Hirsch & Sons Iron and Rail Co.”

“Cal Hirsch & Sons Iron and Rail Co. 7/7/03

Gentlemen:—Please state at your earliest convenience what scrap you have to offer suitable for our purpose and the price—also what delivery you want to make us, stating definitely just what time we can positively depend upon.

Yours truly,

Peru Steel Casting Co.”

“Peru Steel Casting Co. 7/9/03

Peru, Indiana.

Offer five hundred tons scrap melting steel twenty-five gross delivered can make delivery suitable to you. When do you want it? Answer.

Cal Hirsch & Sons Iron and Rail Co.”

“Peru Steel Casting Co. 7/9/03

Peru, Indiana.

Gentlemen:—Yours of the 7th received. We can no doubt deliver 500 tons of heavy melting steel and can make delivery satisfactory. Kindly state delivery wanted. We can sell this material at \$20.50 gross ton delivered.

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We await to hear from you by wire as we have accordingly wired today of which enclosed please find copy.

Yours truly,
Cal Hirsch & Sons I & R Co.”

“Peru, Ind. July 9, 1903

Cal Hirsch & Sons, Iron & Rail Co.
St. Louis, Mo.

Gentlemen:—We note your message 9th. inst, regarding scrap, but as we are more particularly interested in the kind of scrap you have to offer there is no necessity in wiring in regard to this matter as we are only investigating the scrap matter and locating available quantities.

Yours truly,
Peru Steel Casting Co.”

“Peru Steel Casting Co. 7/11/03
Peru, Indiana.

Dear Sirs:—Yours of the 9th received and noted. In regard to melting steel in question—we could give you first class heavy melting steel and am satisfied the material will come up to your understanding. We would ask you to wire us because we are continually in correspondence with the different consumers of this material and are likely to dispose of what we have on hand at any day.

Yours truly,
Cal Hirsch & Sons Iron and Rail Co.”

“Peru, Ind. July 15, 1903

Cal Hirsch & Sons Iron and Rail Co.
St. Louis, Mo.

Gentlemen:—

We note yours 11th inst. regarding scrap, but you do not state what class of scrap it is. It is essential that we know what we are buying and accordingly would thank you to state just such quality as you can fully guarantee.

Yours truly
Peru Steel Casting Co.”

“Peru Steel Casting Co. 7/14/03
Peru, Ind.

Dear Sirs:—Yours of the 13th received and noted. In reference to class of material we can furnish you, it consists of rails, springs, knuckles, drawbars and other railroad melting steel. We will make the specifications to answer your purpose; in fact we can conform to specifications you require as we have previously shipped

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you and we know about what you want. Kindly wire us whether we should enter your order or not, and oblige.

Yours truly,
Cal Hirsch & Sons Iron and Rail Co.”

“Peru, Ind. July 15 1903

Cal Hirsch & Sons Iron and Steel Co.
St. Louis, Mo.

Gentlemen:—We note yours 14th inst regarding scrap. We will not want any draw bars unless the sand has been completely removed from them and none of the other railroad stock unless it is convenient for our charging boxes. At what price will you furnish us a single car of this material so we can determine definitely what it is?

Yours truly,
Peru Steel Casting Co.”

“Peru Steel Casting Co. 7/16/03
Peru, Ind.

Dear Sirs:—Referring to conversation over phone to-day with your Mr. Eastman, we would thank you to let us know whether you want us to ship you the car load of steel as sample or do you wish us to enter your order for 500 tons?

Yours truly,
Cal Hirsch & Sons Iron and Rail Co.”

“Peru, Ind. July 22, 1903.

Cal Hirsch & Sons Iron and Rail Co.
St Louis, Mo.

Gentlemen:—In further reference to scrap, beg to state that we have decided to give you an order for sample car subject to our approval of the 500 tons mentioned some time ago. We hope this car will prove satisfactory, and would caution about getting anything in that we cannot handle in our charging boxes.

The order is given on condition that you can make immediate shipment of the sample car, for if the scrap does not prove satisfactory we will want to have time to investigate sources of supply elsewhere.

Yours truly,
Peru Steel Casting Co.”

The complaint at this place sets out a number of other letters, which passed between the parties, all of which were

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written subsequent to July 22, 1903, and which relate to the shipment of scrap steel. The complaint then proceeds as follows:

“Plaintiff further says that, pursuant to defendant’s instructions, it shipped to defendant in car, to wit, No. 60,163, over the Wabash Railroad, the sample car of scrap referred to in said letters of date July 22, 1903, which was received by defendant on, to wit, the 7th day of August, 1903, and was inspected and accepted by it, as a sample car of the five hundred gross tons to be delivered to it by plaintiff as herein set forth, and afterwards, to wit, on August 17th, 1903, said defendant accepted the offer of plaintiff to sell it five hundred gross tons of heavy melting steel scrap at \$20.50 per gross ton of 2,240 pounds per ton, f. o. b. cars Peru, Indiana, as aforesaid, and wrote plaintiff by its said letter of that date, ordering of plaintiff the shipment of another carload of the material so contracted for defendant under said written agreement, which was delivered by plaintiff to and accepted by said defendant; and afterwards, to wit, on September 28, 1903, pursuant to the order and instruction of said defendant, plaintiff delivered to defendant another, the third carload of the material so contracted for by defendant under said written agreement, which was received and accepted by said defendant; that three carloads of material so delivered to and accepted by said defendant, aggregated sixty-four tons, nine hundred and sixty pounds, all of which received, accepted and paid for by said defendant, under, pursuant to and in compliance with the terms of said written agreement, and no part of said material was ordered, delivered or paid for under or pursuant to any contract other than the written agreement above set out.”

The complaint further avers, in substance, that appellant complied in all things with the terms of the agreement, but that appellee, after accepting three carloads of the material, wrongfully violated the terms of its agreement and refused to accept the remainder of said 500 tons, or any part thereof;

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that appellant has at all times been ready, willing and able to comply with the terms of said contract, and deliver the remainder of said scrap steel in accordance with the terms of said agreement, but appellee refuses to accept the same; that the real value of said material f. o. b. cars at Peru did not exceed \$12.50 per ton, and that plaintiff was damaged in the sum of \$4,350.

The demurrer to this complaint presents a single question: Do the letters and telegrams set out in the complaint considered together constitute a written contract, by the terms of which appellant agreed to sell to appellee 500 tons of scrap steel at the price of \$20.50 per gross ton, and by the terms of which appellee agreed to purchase that amount of material at the price stated? There is no doubt that appellant proposed by letter to sell to appellee 500 tons of scrap steel for the price mentioned, but appellee contends that the complaint does not set out any letter or other written communication, by the terms of which appellee

3. accepted this offer. A contract is created by an offer and acceptance, and the acceptance must be unconditional and in the terms of the offer. *Havens v. American Fire Ins. Co.* (1894), 11 Ind. App. 315, 39 N. E. 40; *Schmitt v. Weil* (1910), 46 Ind. App. 264, 92 N. E. 178; *Corcoran v. White* (1886), 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858; *Wilkin Mfg. Co. v. H. M. Loud & Sons Lumber Co.* (1892), 94 Mich. 158, 53 N. W. 1045; *Baker v. Holt* (1882), 56 Wis. 100, 14 N. W. 8.

By the telegram and letter of July 9, appellant offered to sell appellee 500 tons of melting scrap steel at the price of \$20.50 per gross ton, delivered at Peru, Indiana. It

4. is claimed that this offer was accepted by appellee by its letter of July 22, on condition that the carload ordered by that letter as a sample proved satisfactory. The body of this letter is as follows: "In further reference to scrap, beg to state that we have decided to give you an order for sample car subject to our approval of the 500 tons men-

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tioned some time ago. We hope this car will prove satisfactory, and would caution about getting anything in that we cannot handle in our charging boxes. The order is given on condition that you can make immediate shipment of the sample car, for if the scrap does not prove satisfactory we will want to have time to investigate sources of supply elsewhere.” Appellee claims that this letter cannot be so construed as to amount to an acceptance of the offer previously made, and that it amounts only to an order for a carload sample of the 500 tons previously mentioned.

If this letter constitutes an acceptance of appellant’s offer in the terms in which it was made, the contract was thereby concluded, and the complaint will be held to state a cause of action, but if this letter did not amount to an acceptance of such offer, there was no contract, and the complaint is insufficient.

It is the duty of this court, as it was of the court below, to construe this letter. If it is clear and unambiguous in its meaning, it becomes the duty of the court to declare such meaning, and determine the question here involved accordingly. If the clear and unequivocal meaning of the letter conveys an intention to accept the proposition of appellant according to its terms, the complaint is sufficient; but if the language of the letter clearly indicates that the writer did not intend to accept the proposition of appellant, then there

is no room for construction, and the complaint must

5. be held insufficient. If the words of a writing clearly express the intention of the writer such intention will prevail, and extraneous evidence cannot be admitted to show a contrary intention. *Morris v. Thomas* (1877), 57 Ind. 316; *Groot v. Story* (1872), 44 Vt. 200; *Smith v. Faulkner* (1858), 78 Mass. 251.

We think that it is clear from the language of the letter of

July 22, that appellee did not intend by such letter to

4. accept the proposal of appellant previously made, either absolutely or conditionally, on the sample car’s

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proving satisfactory. In the first part of the letter appellee states that he has decided to order a sample car of the 500 tons of scrap mentioned some time previously. The fact that the order was expressly limited to a sample car would indicate that there was no intention at that time to order more. Following this part of the letter just referred to, appellee expresses the hope that the car ordered may prove satisfactory, and cautions appellant not to get anything in that cannot be handled in its charging boxes. The letter then concludes: "The order is given on condition that you make immediate shipment of the sample car, for, if the scrap does not prove satisfactory, we will want to have time to investigate sources of supply elsewhere." We think that the word "order," as used in that part of the letter just quoted, clearly refers to the order for the sample car, as no other order was given by the letter under consideration. The reason given in the letter for desiring an immediate shipment of the sample car cannot be held to indicate that appellee accepted the previous proposition of appellant, and agreed to accept and pay for 500 tons if the sample car proved satisfactory. The only legitimate meaning which can be drawn from this language is, that if the sample car proved satisfactory appellee would not be compelled to look elsewhere for sources of supply.

Appellant insists that the letter of appellee under consideration is not entirely free from doubt as to its meaning, and that, for the purpose of resolving any doubt as to such question, we should look to the entire correspondence. From a consideration of the language employed in the letter we have no doubt as to its meaning, but, in obedience to the suggestion of counsel, we have examined all the correspondence preceding and leading up to the letter of July 22, and a consideration of this correspondence tends to confirm us in the opinion first expressed.

All the letters of appellant prior to July 22 indicate a desire on its part to obtain an order from appellee for 500

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tons of steel scrap. In its letter and telegram of July 9, it makes the offer to sell, fixes a price, and requests appellee to answer by telegraph. In subsequent letters, especially the one of July 14, appellant urges appellee to place the order. In all the letters of appellee, written prior to July 15, it studiously declines to discuss either price of material or quantity, all its letters being limited to inquiries concerning the quality and kind of material appellant had, and the time when same could be delivered.

The first letter in which appellee made any reference to quantity or price of material was the one under date of July 15, in which it says: "At what price will you furnish us a single car of this material so we can determine definitely what it is?" On the following day appellant wrote to appellee, referring to a telephone conversation, and inquiring whether appellee wanted its order entered for a sample car or for 500 tons.

It was in response to this letter that appellee wrote the letter of July 22, which we have previously discussed in this opinion. If from a consideration of the letter standing alone there can be the slightest doubt that appellee intended thereby to order only a single carload of the material, and not to order the 500 tons which appellant had been insisting on selling, such doubt is entirely removed when the letter in question is considered in connection with the previous correspondence, and especially when considered in connection with the two letters immediately preceding it.

The complaint sets out a number of letters which are alleged to have been interchanged between appellant and appellee after July 22, 1903, and also avers that certain steel scrap was shipped by appellant to appellee, and received and paid for under the contract. Appellant insists that it is the duty of the court, in passing on the sufficiency of the complaint, to consider these subsequent letters,

5. and also the subsequent acts and conduct of the parties as averred. If the letter of July 22 was ambiguous,

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or capable of more than one meaning, or, if this letter and those which preceded it, when considered together, were uncertain, indefinite or obscure in meaning, then the means of construction contended for might be resorted to; but where there is no obscurity or uncertainty in the words used, and where the meaning is clearly apparent from the language employed, such meaning will control, and the court cannot look outside of the language employed to find a meaning different from that which is explicitly expressed. *Newpoint Lodge, etc., v. School Town of Newpoint* (1894) 138 Ind. 141, 37 N. E. 650; *Morris v. Thomas, supra*; *Diamond Plate Glass Co. v. Tennell* (1899), 22 Ind. App. 132, 52 N. E. 168; *Gardner v. Caylor* (1900), 24 Ind. App. 521, 56 N. E. 134.

The fourth and fifth assignment of errors attempt to question the sufficiency of the evidence to support the judgment of the court. This case was triable by a jury, and

6. was actually so tried. The provisions of §8, of the act approved March 9, 1903 (Acts 1903 p. 338, §698 Burns 1908) do not apply, therefore, to this case, as that section applies only to cases not triable by a jury. An attempt, therefore, by a direct assignment of error, to

7. question the sufficiency of the evidence to sustain the verdict, in a case of this kind is unavailing. In cases triable by a jury, such a question can be presented to this court only by assigning as one of the causes for a new trial that the verdict or decision is not sustained by sufficient evidence, and then assigning as error the action of the trial court in overruling the motion for a new trial.

The trial court did not err in sustaining the demurrer to the second paragraph of amended complaint, and as this is the only error properly presented and not waived, the judgment is affirmed.

NOTE.—Reported in 96 N. E. 807. See, also, under (1) 3 Cyc. 388; (2) 2 Cyc. 1014; (3) 9 Cyc. 247, 267; (4) 35 Cyc. 53; (5) 17 Cyc. 567, 607; (6, 7) 2 Cyc. 999. As to letters and telegrams, considered together, to make out a contract, see 110 Am. St. 754.

GANDY v. SEYMOUR SLACK STAVE COMPANY.

[No. 6,574. Filed February 17, 1910. Rehearing denied April 22, 1911. Transfer denied April 3, 1912.]

1. **EVIDENCE.**—*Parol Evidence.*—*Written Contract.*—*Superadded Term.*—Where a written contract for the purchase of staves contained no provision as to where inspection should be made, evidence of an oral agreement as to the place of inspection, made thereafter, related to a superadded term not inconsistent with the writing, and was not objectionable under the rule that all oral negotiations were merged in the contract. p. 76.
2. **SALES.**—*Action for Price.*—*Delivery.*—*Burden of Proof.*—In an action for the price of staves sold, the burden was on plaintiff to show a delivery of the goods described in the contract. p. 76.
3. **SALES.**—*Description.*—*Contract.*—*Performance.*—The quality is a part of the description of a thing agreed to be sold and the vendor is bound to furnish articles corresponding with the description. p. 77.
4. **SALES.**—*Implied Warranty.*—*Quality.*—*Opportunity for Inspection.*—Where goods are offered for delivery under a contract, it is the duty of the vendee to inspect the same before acceptance, if he desires to save his rights in case the goods are of an inferior quality, as there is in such case no warranty of quality which survives acceptance. p. 77.
5. **CUSTOMS AND USAGES.**—*Sales.*—*Quality of Article Sold.*—*Evidence.*—For the purpose of determining whether staves sold under a contract were No. 1 or No. 2 grade, it was competent to show the custom of the trade as to the meaning of such terms. p. 77.
6. **CUSTOMS AND USAGES.**—*Sales.*—*Instructions.*—*Involving Province of Jury.*—In an action to recover the price of staves sold under a contract calling for No. 1 and No. 2 staves, where plaintiff's president testified that the grades were fixed by the manufacturer, and there was evidence to support defendant's contention that the grades mentioned were those established by a cooperage manufacturers' association, an instruction which told the jury that, if it found such contract to have been entered into, the grades named therein were the grades known and recognized by those engaged in the manufacture and sale of cooperage stock at the place where the staves were manufactured, took from the jury the question as to what the terms used in the contract meant and was erroneous. p. 77.
7. **SALES.**—*Fraud.*—*Proof.*—*Instructions.*—Fraud need not be proved by direct or positive evidence, and an instruction, in an action for the price of goods sold, which told the jury that defend-

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ant had the burden of proving the defense of fraud by positive and specific affirmative proof, was erroneous. p. 78.

From Whitley Circuit Court; *Joseph W. Adair*, Judge.

Action by the Seymour Slack Stave Company against Oscar Gandy. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Thomas R. Marshall, William F. McNagny and P. H. Clugston, for appellant.

Merrill Moores, Andrew A. Adams, Walter Myers and John Ogden, for appellee.

ROBY, J.—This action was brought by appellee against appellant to recover the purchase price for certain hoops and staves. The complaint is in three paragraphs. The first two count on written contracts, and the third on a verbal contract. The contract, which is the basis of the first paragraph is as follows:

“This contract and agreement made this 13th day of January by and between the Seymour Slack Stave Company, of Seymour, Indiana, a corporation of the state of Indiana, parties of the first part, and O. Gandy & Co. of Churubusco, Indiana, parties of the second part witnesseth: That for and in consideration of One Dollar in paid by the parties of the second part, receipt of which is hereby acknowledged, the parties of the first part, agree to sell and ship to the order of the second part the following slack cooperage: 1,500,000 28½ inch No. 1 elm staves, cut six staves to 2½ inch in thickness at \$7.50 per thousand. 1,000,000 28½ inch No. 1 hardwood staves, cut from maple, beech and oak, five staves to 1½ inch thickness, at \$7.00 per thousand. 1,000,000 30 inch No. 1 hardwood staves, cut from maple, beech and oak, five staves to 1½ inch in thickness, at \$7.00 per thousand. 3,000,000 28½ inch No. 2 elm staves to contain all the meal grade staves, at \$4.50 per thousand. 200,000 28½ inch No. 2 hardwood staves to contain all the meal grade staves, at \$4.00 per thousand. 200,000 30 inch No. 2 hardwood staves, to contain all the meal grade staves, at \$4.00 per thousand. The above stock is to be shipped on orders of the said second parties in about equal monthly amounts from March 1st 1904, to

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March 1st 1905. Prices named are net cash in thirty days from date of invoice free on board cars at Seymour, Indiana. In witness whereof," etc.

In the second paragraph it is averred that the contract sued on is in the possession of defendant, who refuses to produce the same or a copy thereof, but "that the said contract calls for the sale by the plaintiff to the defendant on board of cars at Seymour, Indiana, of mill run elm staves at \$6.75 per thousand, and hardwood staves at \$6.25 per thousand, the same to be shipped on orders of the defendant as directed in said orders; that said orders were on printed forms of the defendant and stipulated that the stock ordered was to be loaded on cars by plaintiff and billed out in the name of O. Gandy & Co., as shippers, and without any posters or cards either inside or outside of said cars."

In the third paragraph it is averred "the plaintiff and defendant entered into a verbal contract where the plaintiff was to sell to the defendant mill run staves at \$6 per thousand, six foot hoops at \$7.50 per thousand, mill run heading at five cents per set; and mill run heading at four and one-half cents per set; all to be delivered to the defendant on board of cars at Seymour, Indiana, upon the order of the plaintiff."

Delivery of goods is averred, and no question is made as to the sufficiency of the pleadings. The answer is in three paragraphs, general denial, payment and a paragraph admitting the execution of the contracts sued on, and that the defendant, from time to time, sent written orders to the plaintiff for the shipment of carloads of staves to persons named in various parts of the United States; that all staves of the kind described in the contracts, made in the United States, are graded according to the standards adopted by the National Slack Cooperage Manufacturers Association; that both parties were acquainted with the grades so established, and contracted with reference thereto, and in making said contracts by the use of the terms No. 1 and No. 2, and other

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technical terms therein, meant to and did describe the staves according to such grades; that all of the staves delivered were shipped from the city of Seymour; that defendant did not live in said city and did not make any inspection of the shipments, but relied on the contracts and believed that such shipments conformed thereto, "And the defendant says that an inspection of said staves at the point of shipment would not have revealed the defects therein hereinafter pointed out, for the reason that the plaintiff at its factory made said staves so shipped into bundles. That said bundles were securely fastened at either end by ropes or twine. That each of said bundles contained fifty staves and that it was impossible to tell from the inspection of the outside of said bundles the kind or quality of staves contained therein, as there were but the two outside staves in each bundle which were exposed to view, and to determine the kind or quality of the other forty-eight staves in each bundle it would have been necessary to cut the bundle open and take it apart. And the defendant says that the plaintiff cunningly contriving and intending to cheat, defraud and impose upon the defendant as to the kind and quality of staves contained in said bundles and to avoid shipping upon defendant's said orders, staves of the quality and grade specified in said contracts, devised and carried out the following plan and scheme, that is to say, that the plaintiff put a few good staves, and staves complying with said contracts, on the outside of the bundle, and then put staves which were not of the grades specified in said contracts, and which were of less value than the staves which were so specified, and staves having no value whatever, in the inside of said bundles and covered said inferior and defective staves up with said outside good staves, and thereby concealed such inferior staves and made it impossible to discover them by inspection." Alleged defects in the staves delivered are described in detail, and it is averred that because of them appellant's customers would not receive nor pay him for said staves;

that he was compelled to make reductions to them; that appellee was at once notified thereof, and agreed to deduct such amounts from the contract price. It is then averred that the parties put a construction on said contract, the defendant notifying the plaintiff that he would deduct for the bad staves, to which the plaintiff agreed in writing; that acting under such advice he sold several cars at the best price obtainable, and notified defendant thereof and made deductions accordingly, designating when he made payments on what car said payments should be applied, and receiving notice from plaintiff that they had been so applied.

It is then averred that appellee has confused its accounts, and made double and incorrect charges; that appellant has paid all he owes except \$1,460, which he is ready to pay. Trial by jury, with verdict for \$3,323.83. The sum of \$28.24 was remitted, appellant's motion for a new trial was overruled, and judgment rendered on the verdict. The contracts relied on do not provide in terms as to where inspection of staves delivered at Seymour should be made. Appellee introduced witnesses who testified that it was orally agreed that such inspection should be made at

Seymour. Appellant objects to this evidence, on the

1. ground that all oral negotiations were merged in the written contract. The rule is correctly stated, but the testimony related to a superadded term not inconsistent with the writing, and it was therefore admissible. *Singer Mfg. Co. v. Forsyth* (1886), 108 Ind. 334, 9 N. E. 372; *Henry School Tp. v. Meredith* (1904), 32 Ind. App. 607, 70 N. E. 393.

The evidence relating to the place of inspection

2. was conflicting, and the issue was for the jury. The burden was on appellee to show delivery of goods described.

The quality is a part of the description of the thing agreed to be sold, and the vendor was bound to furnish articles cor-

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responding with the description. *Ricketts v. Hayes*
3. (1859), 13 Ind. 181, 189; *Pierson v. Crooks* (1889),
115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; *Miller
& Co. v. Moore, Sims & Co.* (1889), 83 Ga. 684, 10 S. E.
360, 6 L. R. A. 374, 20 Am. St. 329.

“If he [the vendor] tenders articles of an inferior quality, the purchaser is not bound to accept them. But if he does accept them, he is, in the absence of fraud,
4. deemed to have assented that they correspond with the description, and is concluded from subsequently questioning it. This imposes upon the vendee the duty of inspection before acceptance, if he desires to save his rights in case the goods are of inferior quality. There is in such case no warranty of quality which survives acceptance.”
Pierson v. Crooks, supra.

Appellant gave shipping directions for over thirty cars of staves, which were delivered at different times.

One question of fact was whether those instalments in dispute correspond to the description. Other questions of fact which were also determinable from conflicting
5. evidence had to do with inspection and acceptance, and are not material to the point now under consideration. In order to determine whether the staves were No. 1 or No. 2, as the case might be, it was necessary that the meaning of such terms be understood, and to that end it was competent to show the custom of the trade. *Prather v. Ross* (1861), 17 Ind. 495; *Rastetter v. Reynolds* (1903), 160 Ind. 133, 66 N. E. 612.

In the first instruction given the court said: “If you should find from the evidence that such contracts were entered into between the parties you are instructed
6. that the grades named in the contracts are the grades known and recognized by persons engaged in the manufacturing, purchase and sale of cooperage stock at Seymour, Indiana.”

The president of appellee company testified that the grades were fixed by the manufacturer; that the buyer must take the grades so fixed, and that the staves in question were graded in accordance with the contract. The appellee cites, in the support of the instruction, cases where a contract was made for some article manufactured by the vendor, and known by a distinctive name given to it by him, as “Talbot Extra Fine Peas, Sieve 23-24” (*Waeber v. Talbot* [1901], 167 N. Y. 48, 60 N. E. 288, 82 Am. St. 712); “Two pound, Quail Tomatoes” (*Lawder & Sons Co. v. Mackie Grocery Co.* [1903], 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795); “Iron Nos. 1 and 2 of the Poughkeepsie Furnace” (*Beck v. Sheldon* [1872], 48 N. Y. 365.)

The court in the last cited case clearly differentiates its facts from those involved in the case at bar, saying: “It was as if they had contracted with a farmer for 800 bushels of the yellow corn to be raised on his farm in a certain town, or 800 bushels of the winter wheat to be raised on a particular lot, or the apples from the trees in his orchard.” The sale of 800 bushels of No. 1 yellow corn or 800 bushels of No. 1 wheat would be an altogether different proposition. The vendee would be entitled to the commodity specified. The instruction, taken in connection with the evidence, required the jury to find on this issue for the appellee, even though the staves marked No. 1 by appellee at Seymour were, in fact, culls.

It took from the jury the question as to what the terms used in the contract meant, and gave a construction to those terms which was in direct conflict with competent evidence, much of it furnished by appellees.

The court also submitted the issue of fraud made by the third paragraph of answer to the jury, upon an instruction as follows: “As to the charge of fraud in the third

7. paragraph of answer such charges can only be sustained by positive and specific affirmative proof, and the burden of such proof is upon the defendant. A fraud-

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ulent intent is never presumed. When the facts of the case are consistent with either honesty and good faith or dishonesty and bad faith, the presumption of honesty and good faith will prevail.”

The instruction was wrong, “fraud need not be proved by direct or positive evidence.” *Wallace v. Matice* (1889), 118 Ind. 59, 20 N. E. 497.

There are a number of other questions in this record, but they may be eliminated at another trial, and are therefore not discussed.

Judgment reversed, and cause remanded with instructions to sustain appellant’s motion for a new trial.

Myers, C. J., Rabb, Watson and Hadley, JJ., concur.

Comstock, J., not participating.

NOTE.—Reported in 90 N. E. 915. See, also, under (1) 17 Cyc. 721; (2) 35 Cyc. 565; (3) 35 Cyc. 216; (4) 35 Cyc. 229; (5) 12 Cyc. 1084; (6) 12 Cyc. 1103; (7) 20 Cyc. 129. As to implied warranty of quality in contracts of sale, see 102 Am. St. 607.

OLCOTT v. MCCLURE.

[No. 7,539. Filed April 3, 1912.]

1. **CONTRACTS.—Commissions.—Sales of Real Estate.—Statute.**—In an action to recover a commission for the sale of real estate, where the alleged contract is composed of letters written to plaintiff, the contract is governed by §7463 Burns 1908, Acts 1901 p. 104, and said section must be strictly construed in that there must be no doubt as to the existence of such written contract and no dispute as to its contents or provisions. p. 85.
2. **CONTRACTS.—Contents.—Sufficiency.**—If a writing contains matter sufficient to enable the court to ascertain the subject matter and the terms and conditions of the obligation or contract to which the parties intended to bind themselves, it is sufficient. p. 86.
3. **CONTRACTS.—Commissions.—Sales of Real Estate.—Contract Composed of Correspondence.—Sufficiency.**—Where an alleged commission contract for the sale of real estate is composed of correspondence, its effect is to be collected from “all within the four corners” of the several letters or writings which go to make

up the same, and where it appears therefrom that the minds of the parties met as to the subject matter of the contract, its description, the terms on which it was offered, and the commission to be paid in the event of sale, such correspondence is sufficient to constitute such contract. p. 86.

4. **CONTRACTS.—Commissions.—Sales of Real Estate.—Correspondence.—Unilateral Proposition.—Acceptance.**—Where defendant enclosed a letter in an envelope addressed to plaintiff in which he offered certain described land for sale at a named price and stated therein that he would pay a commission of one dollar per acre to the agent with whose buyer he consummated a sale at the price and terms named, though the proposition when standing alone was merely unilateral, it became of binding effect by acceptance. p. 87.
5. **CONTRACTS.—Commissions.—Sales of Real Estate.—Contract by Correspondence.—Identity of Parties.**—In an action on a commission contract for the sale of real estate, where the alleged contract is made up of correspondence, such correspondence, consisting of a letter offering certain land for sale and offering a commission to the agent selling same, which, though not addressed to plaintiff or any one else, was written by defendant and by him mailed in an envelope addressed to the plaintiff, a letter from plaintiff addressed to defendant stating that he would undertake to find a purchaser, and a letter from defendant acknowledging receipt of plaintiff's letter, sufficiently identified the parties to the contract. p. 88.
6. **CONTRACTS.—Commissions.—Sales of Real Estate.—Contract by Correspondence.—Complaint.—Allegation as to Acceptance of Employment.**—In an action to recover a commission for the sale of real estate under a contract made up of correspondence, the allegations of the complaint that, after receiving a letter from defendant offering certain land for sale and offering to pay a commission to any agent selling same, plaintiff mailed a letter to defendant acknowledging receipt of defendant's letter and stating that he would undertake to find a purchaser for the land according to the terms of said letter, that he would write in regard to prospective purchasers, and that defendant should come or send some one when notified by plaintiff, are sufficient to show an acceptance of the proposition made by defendant. p. 88.
7. **CONTRACTS.—Commissions.—Sales of Real Estate.—Offer and Acceptance.—Unreasonable Delay.**—The fact that defendant's proposition to pay a commission for the sale of real estate bore the date of October 19, 1907, did not make the contract open to the objection that there was unreasonable delay in the acceptance of the proposition, where it is shown that the proposition was mailed

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and received in the spring of 1908, and that immediately upon its receipt the acceptance was written and mailed to defendant. p. 88.

8. **CONTRACTS.—Actions.—Complaint.—Allegation of Performance.**—Ordinarily the general averment that plaintiff has performed the contract in all things on his part to be performed, will be sufficient in a complaint to recover on a contract. p. 89.

9. **CONTRACTS.—Sales of Real Estate.—Action for Commission.—Complaint.—Sufficiency.—Performance.**—In an action to recover a commission for the sale of real estate, where the contract was composed of correspondence consisting of defendant's letter in which defendant offered certain land for sale and stated that he would pay a commission of one dollar an acre to the agent with whose buyer he consummated a sale at the price and terms named, plaintiff's letter to defendant accepting the employment, and defendant's reply letter to plaintiff in which he wrote that he was glad plaintiff would undertake to find a purchaser for said farm, that he would consider good trades and that he would keep good his words as expressed in said first letter if he made a sale with a purchaser found by plaintiff, the allegation of the complaint, that plaintiff produced a purchaser for said land with whom the defendant consummated a sale and to whom he conveyed said land for other land and property, sufficiently shows a performance of the contract by plaintiff. p. 89.

10. **PLEADING.—Demurrer.—Admissions.**—By demurring to a complaint the allegations thereof are admitted to be true for the purposes of the demurrer. p. 91.

11. **CONTRACTS.—Commissions.—Sales of Real Estate.—Statute.**—The statute requiring contracts to pay commissions for selling real estate to be in writing (§7463 Burns 1908, Acts 1901 p. 104), was not enacted to enable owners of real estate to commit fraud and imposition against real estate agents, but to protect such owners against the imposition and fraud of such agents. p. 91.

From Jennings Circuit Court; *James K. Ewing*, Special Judge.

Action by William W. Olcott against Richard K. McClure. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Harry C. Meloy, and *Korbly & New*, for appellant.

William Fitzgerald, for appellee.

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HOTTEL, J.—Appellant brought this suit to recover a commission of \$1,846, alleged to be due him from appellee on a written contract for the sale of appellee's land.

A demurrer was sustained to an amended second paragraph of complaint, to which ruling a proper exception was saved. Appellant refused to plead further, and judgment was rendered against him on said paragraph. Said ruling presents the only error relied on in the appeal. This paragraph, after averring that plaintiff was a real estate broker engaged in the business of selling real estate, with his principal place of business at North Vernon, Indiana, and that the defendant resided in the city of Frankfort, Kentucky, avers, in substance, that in the spring of 1908, plaintiff entered into a written contract, whereby he undertook to find a purchaser for defendant's farm of 1,846 acres in the State of Texas; that in case defendant consummated a sale with such purchaser, plaintiff was to receive "a commission of one dollar per acre of said Texas farm, to wit: the sum of eighteen hundred and forty-six dollars;" that said written contract was composed of three letters, viz.: (1) A letter bearing date of October 18, 1907, received by plaintiff in the spring of 1908, a few days after it had been mailed at the city of Frankfort, which letter is filed with the complaint as exhibit A, and is as follows:

"Office of R. K. McClure & Sons,
Incorporated.

Frankfort, Ky. Oct. 19, 1907.

Dear Sir:—

Enclosed you will find description of a Texas farm, offered for sale at a very attractive price. To the agent with whose buyer I consummate a sale, at the price and terms mentioned, I will pay a commission of \$1.00 an acre so soon as the terms of the sale are complied with, but I am in no event to be held liable for more than one commission.

For further information address either the undersigned at Frankfort, Ky., or W. H. McClure, Weatherford, Texas. In case you get any prospective customers

to go to look at this land, W. H. McClure is at Weatherford prepared to show it.

Yours truly,
R. K. McClure."

It is further averred that said letter was enclosed in an envelope directed to plaintiff in the name and style of W. W. Olcott; that with said letter there was enclosed a typewritten description of said Texas farm, with the statement that it was offered at \$16 per acre, and that time would be given on said deferred payments as buyer and seller might agree; that immediately on the receipt of this letter, plaintiff addressed and mailed to defendant, at Frankfort, a letter acknowledging the receipt of said letter, and accepting the employment therein, with the statement that he (plaintiff) "would undertake to find a purchaser for said Texas real estate according to the terms of said letter," and that he would write in regard to prospective purchasers, and that defendant should come or send some one to North Vernon when notified. It is averred that this second letter was signed by plaintiff in the name and style of W. W. Olcott; that the same is in the possession and control of defendant, and that plaintiff has no copy, and for this reason is unable to file a copy of the same, but sets out the substance thereof; that a few days after plaintiff had mailed his letter, he received another from defendant, addressed to him in the name of W. W. Olcott, and the paragraph then sets out what is averred to be the substance of this letter which is, in effect, that defendant had received plaintiff's letter, and was glad that he would undertake to find a purchaser for said farm; that he (defendant) had not misrepresented matters in his first letter; that he would consider good trades and keep good his word as expressed in his first letter, "*if he made a sale with a purchaser found by appellant.*" It is then averred that plaintiff undertook said employment, advertised said farm, and began negotiations to find a purchaser therefor; that he induced parties to visit said land,

and under said contract conducted negotiations between defendant and prospective purchasers; that in the fall of 1908, while performing his duties as such real estate broker, and while acting under said contract of employment, plaintiff introduced to defendant one Elmer F. Emery, as a prospective purchaser for said Texas real estate, with whom defendant consummated a sale of said real estate, and to whom he conveyed said Texas land, receiving therefor 250 acres of land in Jennings county, Indiana, and 200 acres of land in Monroe county, Indiana, and other property; that plaintiff assisted in inducing said Emery to purchase said land, defendant making his own terms with said purchaser, and receiving a consideration satisfactory to himself, uninfluenced by plaintiff; that plaintiff performed his said contract in all things on his part to be performed; that there is due from defendant to plaintiff, for his services under said contract, \$1,846, all of which is due and wholly unpaid.

Appellant's inability to state the exact date of entering into said written contract, his inability to state the exact date of receiving either of said letters one and three, and of mailing letter number two, the loss of the envelope in which the first letter and paper containing description of real estate were sent to him, the loss of the said paper containing said description, the loss of the third letter, the fact that appellant had no copy of any of said lost papers, and his inability for said reason to file copies of either of said lost papers, are each and all specifically and certainly averred, so that no question is raised or presented on account of the absence of any of these technical averments necessary to account for the absence of copies of the alleged lost letters and paper, and the question in the case turns solely on the construction to be placed on, and the effect to be given to, the letter exhibit, and the averments as to the contents of the lost letters and paper.

Section 7463 Burns 1908, Acts 1901 p. 104, is as follows: "That no contracts for the payment of any sum of money,

or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative.”

Said section governs the contract sued on, and the Supreme Court has said that the same must be strictly construed, in that there must be no doubt as to the exist-

1. ence of such written contract and no dispute as to its contents or provisions. *Provident Trust Co. v. Darrough* (1907), 168 Ind. 29, 36, 78 N. E. 1030.

It is expressly averred that the contract was in writing, and in this regard the requirement of the statute is met, so that the questions here presented are, in their last analysis: (1) Is there enough in the letter exhibit, supplemented by the alleged contents of the lost paper accompanying the same, together with the alleged contents of the two lost letters, to show a certain and definite understanding and agreement between appellant and appellee? (2) If such agreement is, in fact, shown by such exhibit, lost letters and paper, do the averments of the complaint show such a performance of said agreement according to its terms and provisions as entitles appellant to the benefits of the same?

In the case of *Austin v. Davis* (1891), 128 Ind. 472, 476, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. 456, the Supreme Court said with reference to contracts of the character here involved: “If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied.” See, also, *Thames Loan, etc., Co. v. Beville* (1885), 100 Ind. 309, 313; *Roehl v. Haumesser* (1888), 114 Ind. 311, 317, 15 N. E. 345; *Wills v. Ross* (1881), 77 Ind. 1, 40 Am. Rep. 279.

If a writing contains matter sufficient to enable the court to ascertain the subject-matter and the terms and conditions of the obligation or contract to which the parties in-

tended to bind themselves, it is sufficient. The effect
2. of such written contract is to be collected from “all
within the four corners” of the several letters or writings which go to make up the same, and if it can be
3. so collected such writings will be held sufficient to
constitute a contract. *Witty v. Michigan, etc., Ins. Co.* (1890), 123 Ind. 411, 413, 24 N. E. 141, 8 L. R. A. 365, 18 Am. St. 327; *Warrington v. Early* (1853), 2 El. & Bl. (75 Eng. Com. Law) 763.

Under the averments of this paragraph of complaint, the subject-matter of the contract, namely, the farm offered for sale, its description, the terms on which it was offered, the amount which appellee agreed to pay to the agent with whose buyer he might consummate a sale, can be definitely and certainly ascertained.

Appellee in his brief says: “The primary question is whether the correspondence shows an agreement, upon which the minds of the parties met, as to description, terms, price, and commission, or whether the negotiations are inchoate and unperfected until something should intervene and be determined in order to give it full effect.” See *Everitt v. Bassler* (1900), 25 Ind. App. 303, 308, 57 N. E. 560.

We think the test here furnished a proper one, and that the contents of letter number one, supplemented by the averments of the complaint as to the contents of appellant’s letter of acceptance and the lost paper and letters, meet every requirement of the rule announced.

It is insisted by appellee that his first letter or proposition was nothing more than an invitation to the person to whom it was made to make an offer to the proposer. This contention is clearly against the import and meaning of the language of the proposition, especially that part of the same which is in the following words: “To the agent with whose buyer I consummate a sale at the price and terms named, I

will pay a commission of \$1.00 per acre, so soon as the terms of the sale are complied with." These words import more than an invitation for an offer. They are a definite, certain proposition, the acceptance of which should bind the proposer.

Of course, standing alone, exhibit A is nothing
4. more than a proposition which is unilateral, but it is such a proposition as may become binding by acceptance.

In the case of *Chicago, etc., R. Co. v. Derkes* (1885), 103 Ind. 520, 523, 3 N. E. 239, the Supreme Court said on this subject: "The contract or bond, when it was first executed, was what is sometimes called an unilateral contract, or a proposition merely from the appellees to the appellant. But when, as shown by the facts stated in each paragraph of the complaint, such contract, bond or proposition, after its delivery by the appellees, was accepted by the appellant, and the affirmative acts on its part, called for and constituting the consideration of such contract, bond or proposition, were fully done, kept and performed by appellant, the appellees cannot be heard to claim there is any want of mutuality in the instrument. So far as that question is concerned, the affirmative acts of the appellant done and performed, as alleged, upon the faith of such contract or bond, made it thenceforward the mutual, valid and binding contract of each and all of the contracting parties." See, also, *Thiebaud v. Union Furniture Co.* (1896), 143 Ind. 340, 344, 42 N. E. 741; *Fairbanks v. Meyers* (1884), 98 Ind. 92, 97.

It is also contended by appellee that his first letter is not addressed to appellant, and that it does not show the names of both parties to the contract. The case of *Sprankle v. Truelove* (1899), 22 Ind. App. 577, 54 N. E. 461, is cited, wherein it is said at page 584: "It is necessary that the note or memorandum should show who are the parties to the contract, by their names, or some reference or description sufficient to identify them." These requirements are com-

pletely met by the averments of this paragraph, that
5. appellee's first letter was received by appellant a few days after it was addressed and mailed to him at appellee's home at Frankfort, and by the further averments of the contents of appellant's letter of acceptance, addressed to appellee at Frankfort, and the letter of appellee acknowledging the receipt of appellant's letter, etc.

As pertinent to this phase of the case, we quote from the language of an instruction approved by the Supreme Court in the case of *Thames Loan, etc., Co. v. Beville, supra*: "It will be sufficient if the letter or letters containing the plaintiffs' proposition were written at their request, or in their behalf, or with their assent, and that the contents of the letter or letters containing the answer to such proposition were communicated to the plaintiffs and assented to by them."

An acceptance of a proposition according to its terms and provisions is necessary to make the contract binding. *Havens v. American Fire Ins. Co.* (1894), 11 Ind. App.

6. 315, 324, 39 N. E. 40; *Myers v. Smith* (1867), 48 Barb. 614. The averments of the complaint as to the contents of the second letter fully meet this requirement.

It is also urged that the proposition, exhibit A, bears date of October 19, 1907, and that there was unreasonable delay in acceptance, the same being deferred until spring
7. of 1908. This objection is met by the averment that the same was received by appellant in the spring of 1908, a few days after it was mailed at Frankfort, and that immediately on receipt thereof, he wrote accepting the employment, together with the averments of appellee's letter in response thereto.

It is further insisted by appellee, in effect, that it was necessary for appellant to aver that he procured a purchaser who was ready and willing to buy "upon the terms proposed" or, "that he procured a purchaser who agreed to take such land at such price in exchange for other, and the

owner agreed to such trade and the property offered and taken in exchange was worth such price.”

The complaint in this case avers that appellant performed his said contract in all things on his part to be performed.

Ordinarily, such general averment is sufficient in this regard. *Fairbanks v. Meyers, supra*; *Purdue v. Noffsinger* (1860), 15 Ind. 386; *Home Ins. Co. v. Duke* (1873), 43 Ind. 418; *American Ins. Co. v. Leonard* (1881), 80 Ind. 272.

But conceding without deciding that, on account of the peculiar character of the undertaking on the part of the agent in such cases, said general averment is not sufficient in every case, it must be remembered that in the complaint under consideration it is averred that appellee in his second letter stated to appellant that he was glad he would undertake *to find a purchaser* for said farm, *that he would consider good trades*, and that he would keep good his words as expressed in said first letter, *if he made a sale with a purchaser found by appellee*. This paragraph then avers that appellant produced a purchaser for said land, with whom appellee consummated a sale of said real estate, and to whom he conveyed the same for other land and property. The cases cited by counsel, which seemingly tend to support their contention in this regard, are either cases where the agent produced a purchaser and the owner refused to sell, or cases where the contract provided that the agent should effect a sale. Of course, in such cases, it is necessary that the agent aver and prove that he produced a purchaser ready and willing to buy at the price and on the terms and conditions proposed by the seller to such agent. The reason for a distinction between this line of cases and those under which the case at bar falls is apparent.

The Supreme Court in the case of *Storer v. Markley* (1905), 164 Ind. 535, 537, 73 N. E. 1081, said: “The execution of the contract sued upon is conceded, and it is shown by the evidence that, in pursuance thereof, appellee

advertised the property for sale, and through his efforts a purchaser was found, at a price which was satisfactory to appellant, and a sale and transfer accordingly effected. The commission stipulated for in the contract was thereupon fully earned and due.”

To the same effect are the following cases: *Lockwood v. Rose* (1890), 125 Ind. 588, 25 N. E. 710; *McFarland v. Lillard* (1891), 2 Ind. App. 160, 28 N. E. 299, 50 Am. St. 234; *Clifford v. Myer* (1893), 6 Ind. App. 633, 34 N. E. 23; *Platt v. Johr* (1894), 9 Ind. App. 58, 36 N. E. 294; *Mullen v. Bower* (1899), 22 Ind. App. 294, 297, 53 N. E. 790; *Miller v. Stevens* (1899), 23 Ind. App. 365, 370, 55 N. E. 262.

In the case of *Mullen v. Bower*, *supra*, this court approved an instruction containing the following language: “If appellant employed appellee to make sale of his farm, and agreed to pay him a commission for finding a purchaser at a fixed price, and if appellee or his agent found a purchaser, and if appellant sold the farm to such purchaser for a price less than fixed by him to appellee, he would be liable to appellee to pay the commissions agreed upon, if any.” The case of *Miller v. Stevens*, *supra*, is applicable to the facts of this case, and the court in that case very clearly distinguishes between the line of cases relied on by appellee as supporting his contention and the class of cases within which the one at bar falls. We quote from that case at page 370: “There is a marked difference between a contract by a broker to furnish a purchaser to his principal and a contract to effect a purchase or sale. In the first instance the broker has earned his commission when he has introduced and brought together the principal and the proposed purchaser between whom a deal is perfected, and in the second instance it is the duty of the broker to perfect a sale upon the prescribed terms submitted to him by the principal before he is entitled to his commission. * * * If a broker who has property for sale is instrumental in bringing the

owner of the property and a purchaser together, and a sale or an exchange is effected by the parties in interest, the broker will be entitled to his commission. * * * In Missouri, it was held that a broker who introduced a purchaser to his principal, or gave his name, so a sale is effected by the owner, though on different terms than first contemplated, such broker is entitled to his commission. *Henderson & Jones v. Mace* [1896], 64 Mo. App. 393. If we keep in view the distinction between a contract of a broker to make a sale of his principal's property upon prescribed terms, and his contract to furnish his principal a purchaser to whom the principal sells upon his own terms, the solution of the question we are now considering becomes easy."

In the case of *Provident Trust Co. v. Darrough* (1907), 168 Ind. 29, 38, 78 N. E. 1030, the Supreme Court, speaking of §7463 Burns 1908, Acts 1901 p. 104, said: "The manifest purpose of the statute was to protect owners of real estate against doubtful and conflicting claims for services as alleged agents in connection with real estate sales. * * * The operation of the statute will not be extended further than necessary to make its spirit and purpose effective."

If the facts averred in appellant's complaint be
10. true—and for the purposes of the demurrer they are
so admitted—to relieve appellee from the payment of
the commission here involved would be to permit him to
defeat and defraud the appellant of a commission honestly
earned. The statute just cited was enacted to pro-
11. tect the owners of real estate against the imposition
and fraud of real estate agents, not to enable them to
commit such fraud and imposition against such agents.

We think it clear that the court erred in sustaining appellee's demurrer to the second paragraph of amended complaint. The judgment is therefore reversed, with instruc-

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tions to the court below to overrule said demurrer, and for any other proceedings not inconsistent with this opinion.

Felt, C. J., Myers, Adams, Ibach, Lairy, JJ., concur.

NOTE.—Reported in 98 N. E. 82. See, also, under (1) 19 Cyc. 191, 219; (2) 9 Cyc. 298; (3) 9 Cyc. 299; 19 Cyc. 220; (4) 9 Cyc. 257; (5) 9 Cyc. 299; (6) 9 Cyc. 717; (7) 9 Cyc. 291; (8) 9 Cyc. 722; (9) 9 Cyc. 722; 10 Cyc. 274; (10) 31 Cyc. 333; (11) 19 Cyc. 219. As to the proof of employment necessary on the part of a real estate agent suing for commission, see 139 Am. St. 227. As to the necessity that a memorandum within the statute of frauds show the parties to the contract, see 13 Ann. Cas. 313. On the question what constitutes employment of broker which will entitle him to commissions otherwise earned, see 27 L. R. A. (N. S.) 786.

THE REGINA COMPANY v. GALLOWAY.

[No. 7,547. Filed April 3, 1912.]

1. TRIAL.—*Reception of Evidence.—Objections.—Motion to Strike Out.*—Where a witness was permitted to testify at some length, an objection to his testimony, made for the first time at the close thereof, and also a motion to strike out the same, which followed a ruling on the objection, and was based on the same grounds offered in support of the objection, were each correctly overruled. p. 93.
2. JUSTICES OF THE PEACE.—*Jurisdiction.—Set-off.—Counterclaim.—Amount of Demand.*—Where a set-off or counterclaim for unliquidated damages is pleaded in an action before a justice of the peace, he has jurisdiction, if the defendant, after crediting the plaintiff's demand, does not claim more than \$200, the jurisdiction in such cases being determined by the damage claimed. p. 94.

From Greene Circuit Court; *Charles E. Henderson*, Judge.

Action by The Regina Company against John W. Galloway. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Daniel W. McIntosh and *Theo. E. Slinkard*, for appellant.

Oscar E. Bland and *Henry W. Moore*, for appellee.

IBACH, P. J.—Appellant sued appellee before a justice of the peace on four notes for \$25 each, interest and attorneys' fees. Appellee filed a counterclaim, in which he pleaded that the notes were given as part of the purchase price of a musical instrument called a concerto; that appellant had warranted the mechanical construction and durability of the machine for one year from the date of sale; that this warranty had failed; that appellee had already paid \$275 for the concerto, and had on his hands a worthless machine, and was greatly damaged by the breach of warranty. He demanded judgment for \$200 on his counterclaim, and obtained such judgment. Appellant appealed to the circuit court, and there appellee again recovered judgment for \$200.

R. A. Mitchell was permitted to testify at some length, and at the close of his testimony, appellant's counsel objected, for the first time, to the whole of his testimony, giving his reasons, and on his objection being overruled, he moved to strike out such testimony for the same reasons, which motion the court overruled. These rulings of the court are assigned as error.

The rulings were correct. "For evidence first taken at the trial, the objection to a fact or group of facts must be taken at the moment after the offeror has uttered his question or otherwise made his offer of the fact; except that where the ground of the objection is found only in some feature of a witness' answer which could not have been relied upon until the answer was made, the objection may and must be made immediately after the answer." Wigmore, *Evidence* (Pocket Code) §74. See, also, *Crabs v. Nickle* (1854), 5 Ind. 145; *Darnall v. Hazlett* (1859), 11 Ind. 494; *Newlon v. Tyner* (1891), 128 Ind. 466, 27 N. E. 168, 28 N. E. 59; *Cleveland, etc., R. Co. v. Wynant* (1893), 134 Ind. 681, 34 N. E. 569; *Swygart v. Willard* (1906), 166 Ind. 25, 76 N. E. 755; *Ewbank*, Ind. Trial Ev. §258, and cases cited. It is not error to overrule a motion to

strike out testimony, when such testimony has been admitted without proper objection, if opportunity for objection has been offered. *Newlon v. Tyner, supra; Cleveland, etc., R. Co. v. Wynant, supra; Wysor Land Co. v. Jones* (1900), 24 Ind. App. 451, 458, 56 N. E. 46; *Ewbank, Ind. Trial Ev.* §258, and cases cited; cases cited under "Trial," 9 Ind. Dig. Ann. §91.

Appellant moved in arrest of the judgment, on the ground that the justice did not have jurisdiction of the subject-matter, and as he had no jurisdiction, the circuit court could acquire none. This motion was overruled, and it is urged that such ruling was erroneous.

Where a set-off, or counterclaim for unliquidated damages is pleaded, the justice has jurisdiction, if the defendant, after crediting the plaintiff's demand, does not claim more than \$200, the jurisdiction in such cases being determined by the damage claimed. §§1721, 1782 Burns 1908, §§1433, 1491 R. S. 1881; *Alexander v. Peck* (1840), 5 Blackf. 308; *Gharkey v. Halstead* (1849), 1 Ind. 389; *Murphy v. Evans* (1858), 11 Ind. 517; *Pate v. Shafer* (1862), 19 Ind. 173; *Elgin v. Mathis* (1894), 9 Ind. App. 277, 279, 36 N. E. 650; *Decker v. Graves* (1894), 10 Ind. App. 25, 37 N. E. 550; *Broderick v. Andrews* (1908), 135 Mo. App. 57, 115 S. W. 519; *Clancy v. Neumeyer* (1889), 51 N. J. L. 299, 17 Atl. 154; *Martin v. Eastman* (1901), 109 Wis. 286, 85 N. W. 359; *Haygood v. Boney* (1894), 43 S. C. 63, 20 S. E. 803; *Bennett v. Forrest* (1895), 69 Fed. 421; *Walcott v. McNew* (1901), 62 S. W. (Tex. Civ. App.) 815.

The theory of defendant's counterclaim seems to be that there was a failure of consideration for the notes by reason of the failing of the warranty, and that appellee was damaged by such breach of warranty to the amount of the difference between the value of the machine as warranted and its actual value. Whether the counterclaim be construed as alleging that nothing was due on the notes, and demanding

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damages for \$200, or as admitting the validity of the notes, and demanding \$200 after crediting the amount thereof, in either case the justice would have jurisdiction, for, on either theory, only \$200 above the amount due the plaintiff was demanded. The justice found against appellant on its cause of action, and for appellee on his counterclaim, and rendered judgment for \$200 for appellee, and in so doing acted within his jurisdiction.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 81. See, also, under (1) 38 Cyc. 1390, 1407; (2) 24 Cyc. 476. As to estoppel on a party to complain of evidence admitted through his failure to object, see 130 Am. St. 768.

THOMPSON ET AL. v. THOMPSON ET AL.

[No. 7,568. Filed April 3, 1912.]

1. **APPEAL.—Briefs.—Failure to Comply With Court Rule.—Waiver of Error.**—Where appellants' brief does not set out so much of the record as fully presents the errors relied on, with reference to the page and line of the transcript, as required by rule twenty-two, such errors are waived. p. 96.
2. **APPEAL.—Motion for New Trial.—Brief.**—Where the overruling of a motion for a new trial is assigned as error, appellants' brief should contain so much of the record as shows that such a motion was filed, and that the same was overruled by the court and an exception saved to such ruling, and should also contain a copy of the motion, or its substance, with reference to the pages and lines of the transcript where the entry may be found. p. 97.

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Action by William C. Thompson and another against John H. Thompson and another. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

S. N. Stevens and *E. C. Martindale*, for appellants.

Harley A. Logan, for appellees.

LAIRY, J.—In the year 1903, William C. Thompson, being the owner of eighty acres of land in Marshall county, deeded

the same to his son John H. Thompson and Anna L. Thompson, husband and wife. This deed was made subject to a mortgage for the sum of \$1,300 which the grantee assumed and agreed to pay as a part of the consideration. The deed also contained the following provision: "The grantor, herein William C. Thompson, reserves for himself individually the right and privilege of residing and living with the grantees herein upon said described real estate at any time he may select during his lifetime. Meaning by this that the grantor herein reserve for the said William C. Thompson, individually the right and privilege of making his home with the grantees herein or any subsequent owner of said described real estate during the said William C. Thompson's life time."

In the year 1907 appellees brought this action to set aside the deed and recover possession of the real estate described therein. The case was tried below on the issues formed on the first and third paragraphs of complaint, and a judgment rendered in favor of appellees, setting aside the deed. There was also a judgment in favor of appellants for \$1,187.60 on the issues formed by their cross-complaint and the answer thereto.

The errors relied on for reversal, as stated in the brief of appellants, are three in number: (1) The court erred in overruling the separate demurrer of appellants to the first paragraph of complaint; (2) the court erred in overruling appellants' separate demurrer to the third paragraph of complaint; (3) the court erred in overruling appellants' motion for a new trial.

Appellants have waived the first two specifications of error by failing to set out in their brief so much of the record as fully presents these errors, with a refer-

1. ence to the pages and lines of the transcript, as required by rule twenty-two of this court. The brief does not set out a copy of the demurrers, and does not state their substance. It does not contain a statement of the

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record showing that such demurrers were ever filed, or that the same were ruled on by the court, or that such rulings were excepted to by the appellants. Both the Supreme Court and this court have held frequently that this amounts to a waiver of any question presented by the demurrer. *Chicago Terminal, etc., R. Co. v. Walton* (1905), 165 Ind. 253, 74 N. E. 1090; *Perry, etc., Stone Co. v. Wilson* (1903), 160 Ind. 435, 67 N. E. 183; *Miedreich v. Frye* (1908), 41 Ind. App. 317, 83 N. E. 752; *Citizens Nat. Bank v. Alexander* (1905), 34 Ind. App. 596, 73 N. E. 279.

A strict enforcement of the rules would preclude us from considering any question sought to be presented by the motion for a new trial. The brief of appellant should

2. set out so much of the record as shows that such a motion was filed, and that the same was overruled by the court and an exception saved by appellant to such ruling, and should also set out a copy of the motion, or give its substance, and refer to the pages and lines of the transcript where the entry may be found. The brief filed by appellant in this case fails to comply with the rules in any of the particulars mentioned. Under the head of points relied on for reversal, we find in the brief a statement that the motion for a new trial was based on two grounds, the first, that the evidence is insufficient to sustain the finding of the court, and the second, that the verdict is contrary to law. While under the rules we are not required to examine the evidence, we have, nevertheless, taken the trouble to do so, and such examination has convinced us that the record contains evidence to support the finding, and that such finding is not contrary to law.

The judgment of the trial court is affirmed.

NOTE.—Reported in 98 N. E. 7. See, also, under (1) 2 Cyc. 1015; (2) 1913 Cyc. Ann. 222.

HARTING v. VANDALIA COAL COMPANY.

[No. 7,856. Filed April 3, 1912.]

1. **APPEAL.—Reservation of Grounds.—Joint Exceptions to Several Acts.—Error Assigned Only on One Act.**—Where, for the purpose of reconsidering its ruling on a demurrer to the complaint, the trial court set aside the submission of a cause to the jury, reconsidered its ruling on such demurrer and sustained the same, to all of which acts the record shows a joint exception, the setting aside of the submission and the further consideration of the demurrer were but preliminary steps to the ruling on the demurrer, which, if erroneous, was the one act harmful to the plaintiff, so that an assignment of error based only upon the ruling on the demurrer properly presented the question of the sufficiency of the complaint on appeal. pp. 99, 101.
2. **APPEAL.—Reservation of Grounds.—Exceptions in Gross.—Assignment of Error.**—The rule in regard to exceptions in gross has been somewhat relaxed from its former strictness, but not to the extent of abrogating the rule that, where there is a joint exception to several distinct acts or conclusions of the court upon which error may be predicated, clearly shown by the record, an assignment of error as to one of such acts presents no question on appeal. p. 100.
3. **MASTER AND SERVANT.—Coal Mines.—Injury to Servant.—Action.—Complaint.**—In an action by the widow of a coal mine employe against the master for the husband's wrongful death, where the theory of the complaint is that of negligence in failing to perform the duty enjoined by the statute (§8597 Burns 1908, Acts 1907 p. 253) to make the mine safe as therein specified, the complaint must state a cause of action within the provisions of the statute. p. 104.
4. **PLEADING.—Complaint.—Construction.—Inferences.**—The court will not indulge in inferences and speculation in support of a complaint, nor will it thus destroy the effect of direct and positive averments to render an otherwise good complaint insufficient. p. 104.
5. **MASTER AND SERVANT.—Coal Mines.—Injury to Servant.—Complaint.—Sufficiency.**—In an action to recover for the wrongful death of a coal mine employe, caused by falling rock and slate from the roof of a mine entry, where the complaint averred that decedent was employed as a "jerryman", whose duty it was to clean up loose slate, rock and debris from the various entries and rooms of the mine, to assist in putting cars on the track in the entries of the mine and to lay track in said mine and to per-

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form any other services when ordered by the mine boss so to do, and that by reason of defendant's failure to make the roof or overhead portions of the mine safe, the injury occurred, the proximate cause of the injury is shown to have been the defendant's failure to perform its statutory duty of making the roof or overhead portions of the mine safe, and the complaint was not insufficient as against a demurrer based on the theory that it showed an assumption of risk by the decedent. p. 105.

From Knox Circuit Court; *Orlando H. Cobb*, Judge.

Action by Lena Harting against the Vandalia Coal Company. From a judgment for defendant, the plaintiff appeals. *Reversed*.

John A. Riddle and *Gilbert H. Hendren, Jr.*, for appellant.

John T. Hays and *Will H. Hays*, for appellee.

FELT, C. J.—Appellant brought this action against the appellee in the Greene Circuit Court to recover damages for the death of her husband while in the employ of appellee.

A demurrer to appellant's amended complaint was overruled, and a change of venue taken to the Knox Circuit Court. After the trial was begun, the case was taken from the jury, the ruling on the demurrer to the amended complaint reconsidered, and the demurrer sustained. Appellant refused to plead further, and now appeals from the judgment rendered against her.

The error assigned and relied on is "sustaining the demurrer to the amended complaint." Appellee insists that

the assignment presents no question for decision by

1. this court. The record entry showing appellant's

exception to the ruling on the demurrer is as follows:

"This court now sets aside the submission of this cause to the jury and reconsiders the former ruling, overruling the demurrer to the amended complaint, and this court now sustains said demurrer to the amended complaint herein, to all of which the plaintiff objects and excepts."

It is the contention of appellee that the setting aside of

the submission of the cause to the jury, the reconsideration of the ruling on the demurrer to the amended complaint, and the sustaining of said demurrer constitute three separate affirmative acts of the court; that appellant's exception is joint, and her separate assignment of error presents no question.

- The rule in regard to exceptions taken in gross has
2. been somewhat relaxed from its former strictness, and a more liberal rule is now applied.

In *Whitesell v. Strickler* (1907), 167 Ind. 602, 78 N. E. 845, several defendants joined in a separate and several demurrer, which was overruled, "to which ruling of the court the defendants object and except." On appeal, each made a separate assignment of error, which was questioned, but held sufficient, and some former decisions holding to the contrary disapproved. On page 609 the court said: "In identifying the question appealed, it is plain that the rules of procedure should be strictly construed, in fairness to the trial court, if for no better reason, but, as in this case, when two or more persons desire to take the same step, but to act separately, and for convenience unite in presenting one paper, and the court by a single action rules against all, the exceptions to the ruling as recorded by the clerk should be liberally construed with a view of according an appropriate exception to each exceptor. And such exception should be allowed unless incompatible with the record. When an appellant excepts to a ruling for the purpose of presenting it to a court of review, it should at least be presumed that his exception was intended to be in the capacity and relation that would make it effective."

In *Honey v. Guillaume* (1909), 172 Ind. 552, 555, 88 N. E. 937, it is stated: "It may be said, with respect to such matters, that, when the record clearly shows what was intended by the court and parties, a party cannot be deprived of his right of exception by the inapt use of words by the court in announcing a ruling, or the clerk in recording the

same. *Whitesell v. Strickler* (1907), 167 Ind. 602 [78 N. E. 845], 119 Am. St. 524; *Bessler v. Laughlin* (1907), 168 Ind. 38 [79 N. E. 1033]; *Bedford Quarries Co. v. Bough* (1907), 168 Ind. 671 [80 N. E. 529], 14 L. R. A. (N. S.) 418.”

The question in the case at bar is different from that in the foregoing cases, but the principle involved is the same, and the liberal rule announced is equally applicable here. In some of those cases it was a question of an apparent joint exception by several parties and a separate assignment of error by each; while here it is a question of an apparent joint exception to several acts followed by an assignment based on only one of those acts.

We do not understand the foregoing cases to abrogate the rule that where there is a joint exception to several distinct acts or conclusions of the court on which error may be predicated, clearly shown by the record, that an assignment of error as to one of such acts presents no question on appeal. *Davis v. Seybold* (1901), 27 Ind. App. 510, 61 N. E. 743; *Terre Haute, etc., R. Co. v. McCorkle* (1895), 140 Ind. 613, 616, 40 N. E. 62; *Pittsburgh, etc., R. Co. v. Wilson* (1904), 34 Ind. App. 324, 72 N. E. 666.

The rule still holds that it is the same questions that were ruled on by the trial court, presented here in substantially the same way, that are reviewable on appeal.

But the later decisions are not so exacting in holding strictly to form, where the court can from the record ascertain that the assigned error does in fact present the

1. identical question ruled on by the trial court, though defective in statement. In this case it is apparent from the record that the ruling upon the demurrer was the one act of the court to which exception was taken and relied upon as error by appellant and that it was so understood by appellee.

The withdrawal of the submission and the further consideration of the demurrer, were but preliminary steps to

the ruling upon the demurrer. We do not hold that error may not in some instances be predicated on the action of the court in setting aside the submission of a cause after trial has begun, but here there is nothing in the order-book entry showing the action of the trial court and appellant's exception thereto, to indicate any act harmful to appellant other than that of sustaining the demurrer, unless it be the form or inapt language of the entry. Form without substance is of no avail. Here no reason appears for setting aside the submission, except that it was a proper preliminary step to the ruling on the demurrer, which act, if erroneous, was the one harmful to appellant.

We therefore hold that the assignment presents the question of the sufficiency of the amended complaint.

The amended complaint charges in substance that appellee is, and was on February 6, 1907, an Indiana corporation engaged in the business of mining coal; that it had in its employ more than ten men; that one of its said employes was Charles Harting, who was the husband of appellant; that he was so employed and worked as a "jerryman," "whose duty it was to clean up loose slate, rock and debris, from the various entries and rooms of said mine, to assist in putting cars on the track in the entries of said mine wherever they would run off the same and to lay track in said mine and to perform any other services when ordered by the defendant's mine boss so to do." That it was the duty of the defendant, by and through its mine boss, to see that all loose coal, slate and rock overhead in the entries in its said mine, wherein the miners of said defendant, including said Harting, had to travel to and from their work, were taken down or carefully secured, and to see that the various working places and traveling ways of its servants in said mine were reasonably safe and free from danger of slate and rock falling; that appellee wholly failed so to do, and negligently failed and neglected to place sufficient props, crossbars or other artificial support under such slate and rock in the

entry and passageway into which said Harting was sent by the boss in charge of said mine; that on said day while said Harting was in the employ of said defendant, he was ordered by appellee's mine boss to go through a certain entry in said mine, to clean up certain rock which had fallen therein in another and distant part of said mine; that while passing through said entry, in obedience to said order, a large amount of rock and slate in the roof of said entry suddenly gave way, caved in and fell upon said Harting thereby instantly killing him; that said Harting's death was caused wholly by the fault and negligence of appellee in failing to perform its said duty and see that all loose coal, slate and rock overhead in said entry, into which said Harting was sent, as aforesaid, were taken down or carefully secured, and while he was in the exercise of due care and caution; that there was nothing in the appearance of said roof to indicate to said Harting the immediate danger of the same falling on him; that the roof of said entry where said Harting was killed, as aforesaid, could have been propped or made secure without interfering with the free use of the same.

Appellee contends that the amended complaint is insufficient, because it shows that decedent was employed as a "jerryman," "whose duty it was to clean up," etc.; that the duty of the boss to make the mine safe, as required by the statute (Acts 1905 p. 65, §§11, 12, §§8579, 8580 Burns 1908) is performed by and through a "jerryman"; that decedent's duty under his employment was that of making the mine safe for other employes, and he therefore assumed the risk incident to such employment, and his widow cannot, on that account, recover in this action; that she does not come within the provisions of the statute; that the complaint is bad because its averments are in the form of recitals.

The theory of the complaint is that of negligence in failing to perform the duty enjoined by the statute, to make the

mine safe as therein specified. To be sufficient against
3. the demurrer it must appear that appellant's complaint states a cause of action within the provisions of the statute. §8597 Burns 1908, Acts 1907 p. 253; *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290, 297, 75 N. E. 270; *Zeller, McClellan & Co. v. Vinardi* (1908), 42 Ind. App. 232, 237, 85 N. E. 378; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413, 421, 73 N. E. 899.

Without discussing the complaint in detail, it may be conceded that it contains some recitals and unnecessary repetitions, but after eliminating the recitals, it still contains a sufficient charge of the violation of a statutory duty by appellee.

The contention most earnestly presented and relied on to show its insufficiency is that the facts averred show that the decedent by his employment assumed the particular risk which caused his death. Appellee asserts "that Harting's employment was that of making safety for the miners, * * * that of a 'jerryman' * * * not under the protection of the statute." Appellee lays great stress upon the duties of a "jerryman," and contends that such employe "is engaged always and at all times and everywhere in making and keeping places safe."

The proposition of law relied on by appellee is not disputed. The question therefore depends on the effect and meaning of the averments of the complaint relative to the employment and duties of decedent.

This court cannot judicially know that the duties of a "jerryman" include all that appellee asserts. The term has no generally defined meaning warranting such conclusion,
4. and the complaint states definitely what his duties were in this case. These averments show that he was employed to clean up coal, rock and debris after they were down, and there is no averment that shows that he was employed to do anything necessary to make the roof or over-

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head portions of the mine safe. To give the complaint the meaning appellee reads into it, requires us to indulge in inference and speculation as to the duties of a "jerryman". This we cannot do in support of a complaint, nor can we, by inference, destroy the effect of direct and positive averments, to render an otherwise good complaint insufficient.

The complaint shows the proximate cause of the death of appellant's husband to have been the failure of appellee to perform the statutory duty of making the roof or

5. upper portion of the entries or passageways of the mine, safe, and does not show that decedent's employment required him to perform this kind of work, or that he was so engaged when killed. The averments show that he lost his life by the falling of the insecure overhead rock and coal in the entry through which he was passing while discharging the duties of his employment.

We therefore conclude that the complaint does not show that decedent, by his employment, assumed the risk due to the unsafe and insecure condition of the overhead portions of the entries in the mine in which he was employed, and the demurrer thereto should have been overruled. *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, 76 N. E. 1060; *Davis Coal Co. v. Polland* (1902), 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319; *United States Cement Co. v. Cooper* (1909), 172 Ind. 599, 606, 88 N. E. 69; *Cleveland, etc., R. Co. v. Powers* (1909), 173 Ind. 105, 114, 88 N. E. 1073, 89 N. E. 485; *Paul Mfg. Co. v. Racine* (1909), 43 Ind. App. 695, 699, 88 N. E. 529.

The other grounds mentioned by appellee, for affirmance of the judgment, are purely technical and insufficient.

The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the amended complaint, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 98 N. E. 132. See, also, under (1) 2 Cyc. 989; (2) 2 Cyc. 986, 988; (3) 13 Cyc. 340; (4) 31 Cyc. 78; (5) 26

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Cyc. 1397. As to liability of a mine owner incurred through his negligence in case of injury to his servant, see 87 Am. St. 579. As to the liability of a mine owner to a servant for injuries caused by the falling of the roof of the mine, see Ann. Cas. 1912B 577.

CHICAGO AND ERIE RAILROAD COMPANY v. CHANEY.

[No. 7,450. Filed January 26, 1912. Rehearing denied April 3, 1912.]

1. RAILROADS.—*Injury to Animals on Tracks.—Complaint.—Theory.—Allegations.*—To be good on the theory that animals injured on defendant's railroad track entered upon the track at a point where the defendant was required to fence, the complaint should allege that the railroad was not fenced at such point. p. 109.
2. RAILROADS.—*Injury to Animals on Tracks.—Negligent Operation of Train.—Complaint.—Failure to Allege Where Animals Entered on Tracks.*—In an action against a railroad company for injury to a team of horses, a complaint alleging that while said animals were on the defendant's track the defendant so negligently ran and operated its cars and locomotive that the same were run against, upon and over said animals, and that the same were injured without fault of the plaintiff, was insufficient in failing to allege that the animals entered upon the track at a highway or street crossing, or at some point where the law imposed on defendant the duty of giving the statutory signals and otherwise operating its train with care. pp. 109, 111.
3. PLEADING.—*Ambiguities.—Construction.—Demurrer.*—A pleading tested by demurrer, must stand or fall upon its own averments, independent of any apparent strength or weakness given to its theory by other parts of the record, and where doubt, ambiguity or uncertainty arises upon such pleading, the construction to be adopted by the court is that against the pleader. p. 111.
4. PLEADING.—*Complaint.—Sufficiency.*—To be sufficient to withstand a demurrer, a complaint should aver every fact essential to the cause of action. p. 111.
5. RAILROADS.—*Injury to Animals.—Negligent Operation of Train.—Complaint.—Causal Connection Between Negligence and Injury.*—In actions to recover for injury to animals caused by the negligent operation of a train, it must appear from the facts directly averred in the complaint, that there was some connection in the way of cause and effect between the acts of negligence complained of and the injury alleged to have resulted therefrom. p. 111.
6. RAILROADS.—*Injury to Animals.—Obstruction of Crossing.—Complaint.—Sufficiency.*—In an action against a railroad com-

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pany to recover for injury to animals, where plaintiff alleged that defendant negligently and unlawfully allowed a freight train to remain standing across a street without leaving any space across said street, and that by reason thereof plaintiff's horses entered upon the tracks of said railway, and that while they were upon said tracks the defendant negligently ran its train upon and over them, the averments, to make the complaint good on that theory, must be sufficient to show that the obstruction to the street crossing was the cause of the animals being upon the track when they were injured. p. 112.

7. *APPEAL.—Overruling Demurrer to Bad Paragraph of Complaint.—Verdict.*—Where there was some evidence to support the theory of a bad paragraph of complaint, so that it does not clearly appear that the verdict rests upon a paragraph that was sufficient, the overruling of a demurrer to such bad paragraph is reversible error. p. 113.

From Starke Circuit Court; *F. J. Vurpillat*, Judge.

Action by John Chaney against the Chicago and Erie Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Ulric Z. Wiley, Arthur H. Jones, W. O. Johnson and Peters & Peters, for appellant.

William J. Reed, for appellee.

HOTTEL, J.—Suit by appellee against appellant to recover damages for injury to a team of horses, caused by the alleged negligence of appellant.

Issues were joined, and the cause tried by a jury, which returned a general verdict for appellee in the sum of \$200, and answers to a series of interrogatories.

Appellant's motions for judgment on the answers to the interrogatories and for a new trial were overruled, and this appeal taken.

Errors presenting the sufficiency of each of the paragraphs of complaint, and the ruling on the motion for new trial, are assigned and relied upon.

The first paragraph of amended complaint, omitting the formal parts, alleges, in substance, that on October 5, 1907, plaintiff was the owner of a team of horses, a buggy and a

set of harness, of the value of \$200, which horses were hitched to said buggy, “which animals so hitched as aforesaid, on said day, *on account of the carelessness and negligence of the defendant in the management of its cars went and entered* upon the tracks of said railway, without any fault on the part of this plaintiff. And this plaintiff says that while the said property was on defendant’s tracks the defendant so carelessly and negligently ran and operated its cars and locomotive that the same were run against, upon and over the said animals, buggy and harness, whereby and by reason of the same, one of said horses was killed and the other crippled, maimed and injured, and the buggy and harness destroyed in said county, and without any fault of said plaintiff,” etc.

The second paragraph avers that defendant had “laid and maintained a main track and a side track over and across Main street in Ora, Starke County, Indiana, over which said locomotive and cars were run. That defendant on said date negligently and unlawfully suffered, permitted and allowed a freight train to remain standing across said Main street without leaving any space across said street, and thereby obstructing the same.” Then follows the allegation of ownership of said horses, etc., and that “by reason of said crossing being obstructed, as aforesaid,” the horses *went and entered* upon the tracks of said railway, without any fault on the part of appellee; that while said property was on said tracks, “said defendant so carelessly and negligently ran and operated its locomotive and cars, that the same were run upon and over said animals * * * all in said county, and without any fault of said plaintiff.”

The first question presented is the sufficiency of each of these paragraphs of complaint. It will be observed from the allegations of each paragraph that it nowhere appears in either where appellee’s team entered on appellant’s railroad track. So far as shown by the allegations of the complaint,

it may have wandered on the track through an open, private gate along such railroad.

It is alleged in the first paragraph, in effect, "that said horses so hitched to said buggy on account of the carelessness and negligence of the defendant in the manage-

1. ment of its cars *went and entered upon the track of said railway.*" From these allegations it would appear that appellee was possibly relying on the fact that such animals "*went and entered*" on the track at a point where the company was required to fence, and had failed to do so, but if such be the theory of this paragraph, it is clearly bad, because of the failure to aver that the railroad was not fenced at the point where the animals entered. *Louisville, etc., R. Co. v. Goodbar* (1885), 102 Ind. 596, 3 N. E. 162; *Louisville, etc., R. Co. v. Thomas* (1886), 106 Ind. 10, 5 N. E. 198; *Louisville, etc., R. Co. v. Quade* (1883), 91 Ind. 295.

If this paragraph can be said to be good at all, it must be because of the later averments charging that "the defendant so carelessly and negligently ran and operated its

2. cars and locomotive that the same was run against, upon and over the said animals, buggy and harness whereby," etc.

Appellee relies on the case of *Ohio, etc., R. Co. v. Craycraft* (1892), 5 Ind. App. 335, 32 N. E. 297, as authority for the sufficiency of the above allegations. That case does not contain the identical allegation of the first paragraph here involved, as counsel for appellee insist, and we think a distinction might be drawn between the charge of negligence in the two cases; but in view of the conclusion reached on the other feature of the case, we deem it unnecessary to dwell on such distinction.

It is sufficient to say in this connection, that the case last cited is authority *only* to the extent of holding that the language of the complaint in that case was "a sufficient allega-

tion of the particular act of negligence complained of.” The complaint in that case was not objected to on the ground that it did not allege or show where the animals entered the track, and this question was not therefore presented to, or determined by the court.

In view of the allegation of negligence on which this first paragraph in the case at bar proceeds, it becomes important and necessary to show where the animals entered on appellee’s track. It would be only in case the animals entered at a highway or street crossing, or at some point where the law imposed on the railroad company the duty of giving the statutory signals, and otherwise operating its train with care, that the negligent operating and running of the train could be said to be such negligence as would furnish the causal relation necessary in such cases between the negligence charged and the resulting injury. If the animals entered the track at a point where appellant owed the duty of fencing, and had failed to fence, the negligent operation of the train would be wholly unimportant, because the sole and only negligence which furnishes the cause of action in such a case is the failure to fence in violation of the statute. On the other hand, if the animals entered the track through some open gate at a private crossing, where the company owed no duty of keeping the same closed, the mere negligent operation of the train would not make appellant liable, because in such case liability exists only where there is an intentional, wilful killing of or injury to such animals.

It seems apparent, therefore, in view of said allegations of negligence, charged by appellee, that it was necessary, in order that he might show the causal relation between such negligence charged and the injury to his animals, that he should have alleged that such animals entered on appellant’s tracks at a highway or street crossing, or at some point where they would not be trespassing animals, and where the company owed them the duty of giving signals, and otherwise operating its train with care.

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Appellee seems to take it for granted that this first paragraph of complaint shows an entry of said horses on the track at the street crossing, but no such allegation appears in said paragraph, nor does the inference that such is the fact necessarily follow from the other averments.

A pleading tested by demurrer, must stand or fall on its own averments, independent of any apparent strength or weakness given to its theory by other parts of the

3. record, and where doubt, ambiguity or uncertainty arises on such pleading, the construction to be adopted by the court is that against the pleader. *Pittsburgh, etc., R. Co. v. Moore* (1899), 152 Ind. 345, 359, 53 N. E. 290, 44 L. R. A. 638; *Cincinnati, etc., R. Co. v. Smock* (1893), 133 Ind. 411, 417, 33 N. E. 108; *Shenk v. Stahl* (1905), 35 Ind. App. 493, 501, 74 N. E. 538; *Heintz v. Mueller* (1898), 19 Ind. App. 240, 248, 49 N. E. 293.

The plaintiff must, in his complaint, to make it sufficient to withstand demurrer, aver every fact essential to his cause of action. *Malott v. Sample* (1905), 164 Ind. 645,

4. 651, 74 N. E. 245; *Louisville, etc., R. Co. v. Corps* (1890), 124 Ind. 427, 429, 24 N. E. 1046, 8 L. R. A. 636.

In actions of this character, it must appear, from the facts directly averred in such complaint, that there was some connection in the way of cause and effect between the

5. acts of negligence complained of and the injury alleged to have resulted therefrom. *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290, 300, 75 N. E. 270; *City of Logansport v. Kihm* (1902), 159 Ind. 68, 72, 64 N. E. 595, and cases cited; *McElwaine-Richards Co. v. Wall* (1902), 159 Ind. 557, 562, 65 N. E. 753; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413, 425, 73 N. E. 899.

In the case under consideration such causal relation between the negligence charged in said first paragraph

2. of complaint and the injury resulting therefrom could, under the law, be present only in case the appellee's

horses entered defendant's tracks at a street or highway crossing, or at some point where said company owed toward such horses the duty of giving the statutory signals, and otherwise "operating its train with care," and such averment being absent from this paragraph, it necessarily follows that the same is not sufficient to withstand a demurrer.

What we have said with reference to the first paragraph applies with equal force to the second, in so far as it proceeds on the theory that the negligent operation of appellant's locomotive and cars was the proximate cause of the injury to appellee's property. In fact, if the allegations of this paragraph be construed most strongly against the pleader, as the law requires, the alleged obstruction to the crossing, which by other averments was shown to be a train, would have prevented the team's getting on the track *at the crossing*.

There is, however, another element of negligence charged in this paragraph, which, if properly charged, would make this paragraph good, viz.: That defendant negligently and unlawfully suffered, permitted and allowed a freight train to remain standing across said main street, without leaving any space across said street, and that by reason thereof the horses "went and entered upon the tracks of said railway." To make this paragraph good on this theory, the averments must be sufficient to show that the obstruction to such crossing was the cause of the horses being on the track when they were injured, otherwise the causal connection between the negligence charged and the injury complained of would not be shown.

If it can be said that the averments of this paragraph are sufficient to show that the alleged obstruction to the crossing caused the horses then and there to enter on the track, and while so on the track, as a result of said obstruction, they were run over by appellant's locomotive and cars, we think that a causal connection between the obstruction to

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the crossing and the injury would be shown, and that the paragraph would be good on this theory. To say the least, the language of this paragraph in this respect is open to uncertainty and ambiguity, and in view of the fact that the case must be reversed on the ruling of the court on the first paragraph, we suggest that this paragraph should be made more certain, and proceed on some definite theory.

There was some evidence tending to show a negligent operation by appellant's servants of the train that ran over

said animals, in that they failed to blow the whistle

7. for said crossing, and to give the signals required by statute. This court cannot therefore say that the verdict of the jury may not have been predicated on such negligence. The overruling of a demurrer to a bad paragraph of complaint will not be harmless error, unless it clearly appears from the record that the decision of the court or the verdict of the jury rests on a paragraph that is sufficient. *Bradshaw v. Van Winkle* (1892), 133 Ind. 134, 32 N. E. 877; *Pyle v. Peyton* (1896), 146 Ind. 90, 44 N. E. 925; *Boonville Nat. Bank v. Blakey* (1906), 166 Ind. 427, 76 N. E. 529.

The judgment below is therefore reversed, with instructions to the court below to sustain the demurrer to said first paragraph of complaint, with leave to appellee to amend said paragraph, and for such further proceedings as may be consistent with this opinion.

NOTE.—Reported in 97 N. E. 181. See, also, under (1) 33 Cyc. 1262; (2) 33 Cyc. 1265; (3) 31 Cyc. 81, 322; (4) 31 Cyc. 100; (5) 33 Cyc. 1258; (6) 33 Cyc. 1257; (7) 1913 Cyc. Ann. 3372. As to a railroad company's duty to fence in prevention of injury to live stock, see 21 Am. St. 289. On the question of the constitutionality of statutes requiring railroad company to fence tracks and build cattle guards, see 31 L. R. A. (N. S.) 861. As to the measure of care of railroad company to maintain fence once constructed, see 11 L. R. A. (N. S.) 228. The question of the liability for injury to stock other than by trains, because of breach of statutory duty to fence, is discussed in 37 L. R. A. (N. S.) 1181.

GRANGER ET AL. v. BOSWINKLE.

[No. 7,157. Filed January 3, 1912. Rehearing denied January 31, 1912. Transfer denied April 4, 1912.]

1. JUSTICES OF THE PEACE.—*Action on Bond.—Nature.—Complaint.*—An action on the bond of a justice of the peace is an action *ex contractu*, and to entitle plaintiff to recover he should allege and prove a breach of some duty imposed by the terms of the bond upon which the suit was predicated. p. 116.
2. JUSTICES OF THE PEACE.—*Action on Bond.—Liability for Acts of Special Constable.*—The liability of a justice of the peace and the sureties on his official bond for the acts of a special constable in assaulting and beating another, must be predicated upon the general condition of the bond providing that the justice shall faithfully discharge his duties as such, together with the provisions of §§1727, 1728 Burns 1908, §§1439, 1440 R. S. 1881, which provide the duties and liability of a justice of the peace in the matter of the appointment of a special constable. p. 117.
3. JUSTICES OF THE PEACE.—*Action on Bond.—Breach by Act of Special Constable.—Complaint.—Sufficiency.*—A complaint to recover on the bond of a justice for injuries inflicted by a special constable, was insufficient, which did not allege that the defendant justice of the peace himself made the appointment of such constable *in a particular case*, and that in such particular case he issued and directed to such constable the warrant under which he was acting at the time of inflicting the injury. p. 117.
4. JUSTICES OF THE PEACE.—*Action on Bond.—Liability for Acts of Special Constable.—Criminal Cause.*—Section 1939 Burns 1908, Acts 1905 p. 584, §71, authorizing justices of the peace to appoint special constables in criminal causes in the same manner as in civil cases, in no way provides for any liability against a justice of the peace on account of any such appointment, and there being no other statute creating a liability in such case, an action, which is predicated solely upon the acts of a special constable appointed in a criminal cause, cannot be maintained against a justice of the peace on his official bond. p. 119.

From Newton Circuit Court; C. W. Hanley, Judge.

Action by Matt. Boswinkle against Andrew Granger, ex-justice of the peace, and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

George A. Williams, for appellants.

Dwyer & Robinson and John H. Gillett, for appellee.

HOTTEL, J.—This is a suit on the bond of a justice of the peace. The justice, his sureties and a special constable were all made defendants to the suit, and are now appellants in this court. The alleged breach of the bond charged grew out of an alleged unlawful assault and battery committed on appellee Boswinkle by such special constable appointed by such justice.

The complaint is in two paragraphs, the bond being made an exhibit with each. Demurrers were filed to each paragraph and overruled, and exception saved as to each ruling.

The cause was put at issue by an answer in general denial, trial by a jury, and a verdict for appellee in the sum of \$225. Judgment on the verdict, motion for new trial overruled, and appeal to this court.

The errors assigned present the question of the sufficiency of the complaint and each of the paragraphs thereof, both by an original assignment, that the facts stated therein are not sufficient, and by separate assignment of error calling in question the ruling on the demurrer as to each paragraph. The ruling on the motion for new trial is also assigned as error.

It is first insisted by appellants that their demurrer to each paragraph of the complaint should have been sustained on the second ground thereof, viz., because the action is not prosecuted in the name of the State of Indiana on the relation of the party interested.

Section 253 Burns 1908, §253 R. S. 1881, provides as follows: “Actions upon official bonds, and bonds payable to the state, shall be brought in the name of the State of Indiana, upon the relation of the party interested.”

Appellee concedes that the case should be prosecuted in the name of the State on the relation of the interested party, and insists that by leave of court he was permitted to amend his complaint in this regard, and that he did so amend, and that the action was thereafter prosecuted in the name of the State on the relation of Matt. Boswinkle. The condition

of the record is not satisfactory on this question, but the conclusion which we have reached as to the sufficiency of this complaint, on its merits renders unnecessary the determination of this question.

The first paragraph of this complaint is short, and is as follows: "Plaintiff herein, complains of the defendants herein, and alleges: That on the second day of April, 1908, the defendant Andrew Granger was duly appointed Justice of the Peace for Lincoln Township, Newton County, Indiana. That on the 18th day of April, 1908, he, with James Craig and Frank M. Fuller, other defendants herein, as his sureties, executed his bond, as such Justice, in the penal sum of two thousand dollars (\$2,000) a copy of which is filed herewith and made a part of this complaint, and on April 19, 1908, duly qualified and entered upon the duties of his office. That during his term of office, to wit, on the 17th day of July, 1908, Fred Fuller, one of the defendants herein, while acting as special Constable for said defendant Andrew Granger, Justice of the Peace, aforesaid, having been appointed, duly and legally qualified therefor, which appointment was entered upon the docket of said Justice, by virtue of a warrant of arrest issued to said Fred Fuller as said Special Constable he neglected his duty and proceeded illegally as follows: He assaulted and beat the plaintiff herein, striking plaintiff on the head several heavy blows with a dangerous weapon, to wit, a 'black jack,' and rudely pushed and roughly handled plaintiff and wounded him, while plaintiff was without fault. Whereby plaintiff became, and is, and for a long time will be, shocked, hurt and humiliated, suffering anguish of mind, and was otherwise greatly hurt, bruised and wounded, to his damage two thousand dollars (\$2,000) for which he demands judgment."

This is an action *ex contractu*, and to entitle the appellee to recover, it was necessary that he should allege and

1. prove a breach of some duty imposed by the terms of the bond on which the suit was predicated. There

is not, of course, in the bond itself an express or specific condition providing for liability on account of the breach here charged, but such liability, if it exist at all in a case of this character, must be predicated on the general

2. condition of the bond which provides that said Granger "shall faithfully discharge his duties as such Justice," together with the provisions of the statute which provide the duties and liability of a justice of the peace in the matter of the appointment of a special constable. The sections of the statute which prescribe these duties are §§1727, 1728 Burns 1908, §§1439, 1440 R. S. 1881, controlling civil procedure before justices of the peace, and §1939 Burns 1908, Acts 1905 p. 584, §71, under criminal procedure before justices. The provisions of these sections are as follows: 1727. "Whenever there shall be no constable convenient, and in the opinion of the justice an emergency exists for the immediate services of one, such justice may appoint a special constable to act in a particular cause; and shall note such appointment in such cause on the docket, and shall direct process to him by his name; and such constable, so appointed, shall discharge the duties, receive the fees, and have the powers, in such cause, appertaining to the office." 1728. "The justice appointing such constable shall, with his sureties, be liable on his official bond for any neglect of duty or illegal proceedings by such constable in such cause." 1939. "Special constables may be appointed under like circumstances, having like powers and being subject to like liabilities, as in civil cases."

The bond and these sections of the statute furnish the only grounds or conditions on which liability in this case can be predicated. This being true, it seems that the cita-

3. tion of these sections of the statute, in connection with the foregoing copy of the first paragraph of the complaint, ought to be sufficient to indicate that error was committed in overruling the demurrer to said paragraph.

It will be observed that this statute, authorizing the appoint-

ment of special constables by justices of the peace, expressly limits the power of the appointment, and authorizes the same only where there is no constable, and an emergency exists, and then the appointment shall be *in the particular cause*, and in fixing the liability of the justice on his official bond, for the neglect of such constable, the statute expressly limits the liability to the "neglect of duty or illegal proceedings by such constable in such cause."

The complaint in such a case must allege, among other things, that the justice of the peace, against whom the action is prosecuted, himself made the appointment of the special constable; that he (the justice) made such appointment during his term of office *in a particular case*, that he issued and directed to such special constable a warrant *in such case* for the arrest of the injured party on whose relation the suit is brought, and that in serving such warrant so issued *in such case* such constable neglected his duty, or illegally proceeded, setting out the facts relied on as constituting the neglect of duty or illegal proceedings.

There is in this paragraph no averment that Granger, justice of the peace, appointed Fuller, special constable in any particular case, and, in fact, no positive allegation that said Granger appointed such special constable, or that such justice issued to him the warrant under which he was acting, or that the warrant was *directed* to such constable, or that it was issued in the *particular case* in which such special constable was appointed. This paragraph is in other respects uncertain and ambiguous in its averments, but the averments indicated as omitted are so clearly essential and necessary to a good complaint in an action of this character that we deem further comment thereon unnecessary.

The second paragraph of complaint, while not being open to all the objections that might be urged against the first paragraph, is, for the reasons indicated, clearly insufficient as against demurrer.

But there is a still more important reason for holding both

these paragraphs of complaint bad. The defects above suggested might be cured by amendment, but if we be

4. correct in our notion as to the other infirmity of these paragraphs, no amendment can cure the same, so long as they proceed on their present theory. Both paragraphs of this complaint are predicated on the theory that a justice of the peace is liable on his bond for the acts of a special constable appointed by him in a criminal cause, the same as he would be for the acts of such constable so appointed in a civil cause. This can be true only in case there is an express statute so providing, because, as above indicated, there is no provision of the bond that would make him liable, and in such cases liability must be found in the bond itself, or in the statutory provisions defining the duties, obligations and liabilities of such officer. *Hawkins v. Thomas* (1892), 3 Ind. App. 399, 29 N. E. 157. See, also, *Urmston v. State, ex rel.* (1880), 73 Ind. 175; *Bowers v. Fleming* (1879), 67 Ind. 541; *Detroit Sav. Bank v. Ziegler* (1882), 49 Mich. 157, 13 N. W. 496, 43 Am. St. 456.

The only provision to be found on this subject under the criminal procedure is §1939, *supra*. It will be observed that the constable alone is mentioned in this section, and his powers and liabilities alone are defined. This section authorizes the appointment of such constable in the same manner as in civil cases, and therefore gives to a justice of the peace the right to make such appointment; but further than this, the section in noway affects a justice of the peace. It in noway attempts to provide for or fix any liability against such justice of the peace on account of such appointment.

It follows, therefore, that there can be no liability of a justice of the peace on his official bond, predicated solely upon the acts of a special constable appointed by such justice of the peace in a criminal cause.

For the reasons above stated, the court erred in overruling the demurrer to each paragraph of said complaint.

The judgment is therefore reversed, with instructions to

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the court below to sustain the demurrer to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 96 N. E. 208. See, also, under (1) 5 Cyc. 826; (3) 24 Cyc. 430; (4) 1913 Cyc. Ann. 2675. As to the ministerial acts of a justice of the peace for which his sureties are liable, see 91 Am. St. 574.

NEW v. JACKSON.

[No. 6,957. Filed June 6, 1911. Rehearing denied November 16, 1911. Transfer denied April 4, 1912.]

1. APPEAL.—*Briefs.—Attacking Sufficiency of Complaint.*—Where there is no assignment of error which presents the question of the sufficiency of a complaint, attacking its sufficiency in appellant's brief is of no avail. p. 123.
2. APPEAL.—*Presenting Question of Erroneous Instructions.—Briefs.*—Only such instructions as are pointed out as objectionable in the points and authorities in appellant's brief will be considered on appeal. p. 123.
3. TRIAL.—*Instructions.—Fraudulent Representations.—Elements Omitted.—Omissions Covered by Other Instructions.*—In an action for damages for fraud perpetrated in an exchange of property, no error was committed in giving an instruction not purporting to include all the principles of law that enter into fraudulent representations, but which was in accord with such principles in so far as it made the attempt to include them, nor in giving instructions which simply undertook to define the character of the misrepresentation that constitutes fraud, without attempting to include all the elements necessary to a recovery, but in each of which the principles declared were correct, where other instructions were given which correctly covered all omissions complained of and on which appellant was entitled to have an instruction. p. 123.
4. FRAUD.—*Elements.—Knowledge That Representations Are False.—Instructions.*—It is not a necessary element of fraud that one making representations has knowledge that they are false, and, in an action to recover damages for fraud perpetrated in exchange of property, instructions which told the jury that before plaintiff was entitled to recover he must show that the representations charged were made for the fraudulent purpose of inducing plaintiff to make the trade in question, were not errone-

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ous for failure to include that plaintiff must show that defendant knew the representations to be false. p. 124.

5. **APPEAL.—Brief.—Statement That Instruction is "Fatally Erroneous".—Objection Not Available.**—Where the only ground of objection to an instruction stated by appellant in his points and authorities is that it was "fatally erroneous," the objection is too indefinite and uncertain and therefore not available. p. 127.

6. **FRAUDULENT REPRESENTATIONS.—Fraud in Exchange of Property.—Action for Damages.—Instructions.—Instruction Embodying Complaint.—Objection That Complaint Omits a Material Allegation.**—In an action for damages for fraud perpetrated in an exchange of property, where an instruction given by the court contained the allegations of the complaint set out in detail, and told the jury that the complaint and the general denial formed the issue it was to try, and was followed by a further instruction that under the issue thus formed the plaintiff was required to prove all of the material averments of the complaint by a fair preponderance of the evidence, and where such complaint alleged in detail the representations made by defendants as to the quality, character, productivity and value of the farm and other property which defendant traded to plaintiff, and alleged that defendant referred plaintiff to persons whom he had procured to make the same representations, all of which representations were false and upon all of which plaintiff relied, such instructions were not open to the objection that, as to the value of the property at the time defendant traded same to plaintiff, the complaint contained no averment the proof of which would entitle plaintiff to recover. p. 127.

7. **FRAUD.—Fraudulent Representations as to Value of Property.—Effect.**—Where a vendor knows that a vendee is wholly ignorant of the value of the property and is relying upon the vendor's representation as to its value, and such representation is made, not as a mere expression of opinion, but as a statement of fact known by the vendor to be untrue, such a statement is a representation by which the vendor is bound. p. 129.

8. **FRAUD.—Fraudulent Representations.—Opinion.—Statement of Fact.—Question for Jury.**—In an action to recover for fraudulent representations made in an exchange of property, it was for the jury to determine under proper instructions, whether the representations made as to the value of the property were merely the expressions of an opinion or affirmation of facts to be relied upon. p. 129.

9. **APPEAL.—Trial.—Misconduct.—Presumptions as to Regularity.**—Where alleged error is presented relating to the misconduct of the jury, and it appears from the record that such misconduct occurred after the jury had retired to consider their verdict,

and that on being advised of the same the court called the jury into the court room and instructed it as to such misconduct, it will be presumed, in the absence of a showing to the contrary, that the proceedings of the trial court were regular and that both parties to the action were present either in person or by some of their attorneys when such action was taken. p. 130.

10. APPEAL.—*Trial.—Misconduct of Jury.—Record.*—To make objections to the misconduct of the jury available, the record must show that neither appellant nor his counsel had knowledge of the alleged misconduct before the jury returned its verdict; or, in case they had such knowledge, a sufficient excuse for their failure to interpose seasonable objections to such misconduct must be shown. p. 131.

11. TRIAL.—*Misconduct of Jury.—Knowledge.—Waiver.*—Where appellant knew of the misconduct of the jury in time to present a motion to withdraw the submission of the cause to the jury, but failed to do so, he cannot thereafter, on account of such misconduct, avoid the effect of a verdict against him. p. 131.

12. APPEAL.—*Review.—Verdict.—Sufficiency of Evidence.*—Where there was evidence supporting the verdict on all questions material and necessary to a recovery by appellee, the verdict will not be disturbed on the question of the sufficiency of the evidence. p. 132.

From Henry Circuit Court; *Ed. Jackson*, Judge.

Action by Thomas A. Jackson against Thomas H. New. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William Ward Cook, Charles H. Cook, William A. Hough, Mark E. Forkner and George D. Forkner, for appellant.

James E. McCullough, William C. Welborn and Eugene H. Bundy, for appellee.

HOTTEL, J.—Action for damages for alleged fraud perpetrated by appellant on appellee in the exchange and trade of certain properties. The cause was tried by jury, on a complaint in one paragraph, and an answer in general denial. There was a general verdict and judgment for appellee in the sum of \$2,600. Appellant filed motion for new trial, which was overruled and exception saved.

Appellant, in his brief, insists that the complaint omits material allegations, but no error is assigned which pre-

sents to this court any question as to its sufficiency.

1. The only error assigned and presented by appellant's brief is the overruling of the motion for a new trial.

The first ground of the motion for new trial, relied on and presented by appellant under his points and authorities, relates to errors which appellant insists were committed by the court below in the giving of instructions.

2. Only such instructions as are pointed out in the points and authorities as objectionable will be considered by this court on appeal. *Knapp v. State* (1907), 168 Ind. 153, 163, 79 N. E. 1076; *Inland Steel Co. v. Smith* (1907), 168 Ind. 245, 252, 80 N. E. 538.

Only such instructions as are pointed out in the points and authorities as objectionable will be considered by this court on appeal. *Knapp v. State* (1907), 168 Ind. 153, 163, 79 N. E. 1076; *Inland Steel Co. v. Smith* (1907), 168 Ind. 245, 252, 80 N. E. 538.

Instruction number one, given at request of appellee, of which appellant makes complaint, is practically a copy of language used by the Supreme Court in the case of

3. *Frenzel v. Miller* (1871), 37 Ind. 1, 17, 10 Am. Rep.

62, where the court announces as applicable to fraudulent representations four separately numbered "principles of law * * * fairly and logically deducible from the * * * authorities." The instruction here complained of does not attempt nor purport to include all the principles, that enter into fraudulent representations, but in so far as it makes such attempt it is in perfect accord with said principles announced in said case. The principles announced in this case have been approved in many of the more recent cases; and in the case of *Krewson v. Cloud* (1873), 45 Ind. 273, the Supreme Court, in referring to objections made to the complaint and instructions given in the case last mentioned, used the following language, which is very applicable to the repeated objections urged by appellant to instructions in this case. "The second paragraph of the complaint and the instructions given are in exact accord with the principles of law enunciated by this court in *Frenzel v. Miller* [1871], 37 Ind. 1 [10 Am. Rep. 62]. It would be a useless waste of time to attempt to restate and reëxamine the questions so fully considered in that case. We are entirely satis-

fied with such ruling, and have adhered to it in several subsequent cases.”

Appellee’s instructions numbered two, three and four, objected to, simply undertake to define the character of the misrepresentation that will constitute fraud, and do not attempt to include all the necessary elements to a recovery. The principles declared in each are supported by the decisions of the Supreme Court, as announced in the following cases: *Ray v. Baker* (1905), 165 Ind. 74, 88, 74 N. E. 619; *Laidla v. Loveless* (1872), 40 Ind. 211, 216, 217; *Peter v. Wright* (1855), 6 Ind. 183; *Bethell v. Bethell* (1883), 92 Ind. 318, 326, 327; *Parish v. Thurston* (1882), 87 Ind. 437, 438.

Appellant objects to these several instructions on account of certain alleged omissions, and cites a number of cases which correctly hold that where an instruction undertakes to tell the jury just what is necessary in order to maintain an action or defense, it must be complete as well as correct. We recognize this rule as correct, and our holding with reference to the instructions here considered is in no sense in conflict therewith. Neither of the instructions in question attempts to state the entire law of the case, nor the facts necessary to entitle appellee to a recovery, nor do we think it can be said that either attempts to state every element that enters into and constitutes fraud. In so far as each of said instructions attempts to state the law of the case, applicable to the particular element of fraud discussed therein, each instruction correctly states the same, and other instructions given correctly cover all omissions complained of, on which appellant was entitled to an instruction.

Counsel urge against these instructions generally, that they omit an important element necessary to be proven to constitute fraud, viz., the element of knowledge on the

4. part of appellant that the representations made were false. But, under the holdings of this court and the Supreme Court, this is not a *necessary* element of fraud.

Kirkpatrick v. Reeves (1889), 121 Ind. 280-282, 22 N. E. 139; *Frenzel v. Miller, supra*; *Roller v. Blair* (1884), 96 Ind. 203, 205; *Bethell v. Bethell, supra*; *West v. Wright* (1884), 98 Ind. 335, 339; *Furnas v. Friday* (1885), 102 Ind. 129, 1 N. E. 296; *Slauter v. Favorite* (1886), 107 Ind. 291-299, 4 N. E. 880, 57 Am. Rep. 106; *Bolds v. Woods* (1894), 9 Ind. App. 657, 36 N. E. 933; *Culley v. Jones* (1905), 164 Ind. 168, 172, 173, 73 N. E. 94.

But counsel insist that in the absence of such an element in the charge, the court should have told the jury that the statements must have been recklessly made without regard for their truth. In this counsel are in error. In the case of *Furnas v. Friday, supra*, the court said on this subject, at page 130: “It is clear that the paragraph before us does not charge fraud, for *it does not aver that there was any purpose to defraud*, nor that there was any reckless misstatement. On the contrary, the fair conclusion from the facts stated is, that the appellant acted honestly, stated what he believed to be true, and gave the plaintiff a full opportunity to examine the sheep for himself. If the complaint had shown that the defendant professed to be an expert, and that he induced the plaintiff to rely upon his superior judgment or skill, *or if it had shown that the defendant made the representations for a fraudulent purpose*, or had recklessly made them, a very different case would have been presented.” (Our italics.)

In the case of *Kirkpatrick v. Reeves, supra*, at page 282, the court said: “A belief in the truth of a statement does not always clear the person who makes it of a fraudulent purpose or relieve him from liability. * * * An unqualified statement that a fact exists, *made for the purpose of inducing another to act upon it*, implies that the person who makes it knows it to exist and speaks from his own knowledge. If the fact does not exist, and the defendant states of his own knowledge that it does, and induces another to act upon his statement, the law will impute to him a fraudulent

purpose.” (Our italics.) See, also, *Slauter v. Favorite*, *supra*; *Furnas v. Friday*, *supra*; *West v. Wright*, *supra*; *Roller v. Blair*, *supra*; *Bethell v. Bethell*, *supra*; *Brooks v. Riding* (1874), 46 Ind. 15; *Krewson v. Cloud* (1873), 45 Ind. 273; *Booher v. Goldsborough* (1873), 44 Ind. 490; *Frenzel v. Miller*, *supra*; 8 Am. and Eng. Ency. Law 642; *Fisher v. Mellen* (1870), 103 Mass. 503; *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *Slim v. Croucher* (1860), 1 De G. F. & J. (62 Eng. Ch.) *518; *Bullis v. Noble* (1873), 36 Iowa 618; *Raley v. Williams* (1880), 73 Mo. 310; *Oregonian R. Co. v. Oregon R., etc., Co.* (1885), 23 Fed. 232, 10 Sawyer, 464; *Cragie v. Hadley* (1885), 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

The court in the instructions given in this case told the jury, in effect, *that before appellee was entitled to recover, he must show that the representations charged were made for the fraudulent purpose of inducing him to make the trade in question.* Appellant also insists that the authorities relied on by appellee, on this question, are all cases in equity, seeking a rescission and cancelation of the contract, and that the principles therein stated do not apply to a case like the one at bar, seeking to recover damages on account of the fraudulent representations. The question here involved, viz., whether or not it is necessary that the party making the false representations at the time knew them to be false in order to constitute them fraudulent, is discussed in the case of *Frenzel v. Miller*, *supra*, and decided adversely to appellant's contention. This case, as well as all the cases cited and quoted from, recognizes that the representations must be made with a fraudulent intent and purpose. Herein lies the difference between cases like the one at bar and cases in equity seeking relief from mutual mistake, the result of misrepresentations innocently made.

Instruction number twelve is objected to, but no ground of objection is stated in appellant's points and authorities, other than that the instruction was “fatally erroneous.”

Under the well-established rules of this court, such
5. an objection is too indefinite and uncertain, and therefore not available. *Inland Steel Co. v. Smith, supra; Knapp v. State, supra.*

Instructions numbered one and two, given by the court on its own motion, are objected to. Instruction number one sets out the allegations of the complaint in detail and
6. with particularity, and tells the jury that "To this complaint the defendant has answered by a general denial, and this forms the issue you are to try." There was certainly no error in such an instruction. The second instruction follows in these words: "Under the issues thus formed, to entitle the plaintiff to recover in this case, he must have proved by a fair preponderance of all the evidence given in the cause all of the material averments of his complaint."

That appellant should object to these instructions taken together, seems inconsistent with his failure to present, by any assignment of error, the question of the sufficiency of the complaint. But counsel urges to this instruction an objection which he has attempted in his brief, without any assignment of error presenting the same, to raise to the sufficiency of the complaint, and which he also raises to the sufficiency of the evidence, viz.: That the complaint contains no averment of any value which the land and the stock of the "Miller Hopkins Manufacturing Company" had at the time appellant traded it to appellee for his property and that the only averments as to value of said property was that appellant at the time represented his farm to be worth \$4,000, and that "without a particle of evidence of any confidential relation between the parties that fact was not a 'material averment' upon proof of which plaintiff was entitled to recover." Counsel have certainly overlooked the averments of the complaint on this subject. They are too numerous and lengthy to set out in detail in this opinion.

The complaint alleges in detail the representations made

with reference to the quality and character of the soil, its productivity, the crops growing thereon, the probable yield thereof, which it is represented has been the usual yield of the farm, the buildings and improvements and their character, and the value of the farm, the character of the business of the corporation, its assets, earnings, financial condition, its profits, soundness and solidity, value of its stock, that dividends had been declared thereon, the denomination of the separate shares of stock, their face value and the actual worth of the stock proposed to be traded by appellant, and avers that appellant referred to a man whom he (appellant) claimed to have procured to make an examination of the farm, and represented that he would tell appellee the exact truth as to the value of the farm, character of its soil, improvements, crops growing thereon, etc., and that he procured such person to make to appellee the same false representations made by himself; that he (appellant) also referred appellee to a person connected with said corporation, who, he said, knew and would tell him (appellee) the exact truth about the affairs of the same, and that he (appellant) then procured that person to make to appellee the same false representations, with reference to said stock, so made by appellant. The trade in question was made in Hancock county and, it is alleged in the complaint that appellant's land traded was situate in Warrick county, Indiana; that appellee had never seen and knew nothing about the same; that he (appellee) knew nothing about said corporation, its affairs or business, or its financial conditions, or the value of its stock, but for information with reference to all of said matters, both as to the farm and corporation stock, relied wholly on the representations of appellant and the men to whom appellant referred him, all of which appellant well knew, and, so knowing, made said representations for the purpose of deceiving appellee and cheating and defrauding him by inducing him to make said trade; that appellee did so rely on such representations, and by them was induced to

make said trade; that each and all of said representations were false, and appellant knew them to be so when he made them and procured them to be made.

There are other allegations, but we think we have set out sufficient to show that proof of the same would be sufficient to meet the above objection urged to instructions one and two of the court, under the authorities cited and relied on by appellant. *Cagney v. Cuson* (1881), 77 Ind. 494; *Bolds v. Woods, supra*, 663, 664; *Culley v. Jones, supra*; *Manley v. Felty* (1896), 146 Ind. 194, 198, 199, 45 N. E. 74; *Harness v. Horne* (1898), 20 Ind. App. 134, 140, 141, 50 N. E. 395.

“ ‘Where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor’s) representation as to the value, and such representation is not a mere expression of opinion, but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound.’ ” *Culley v. Jones, supra*. See, also, 2 Pomeroy, Eq. Jurisp. §§878, 879; *Picard v. McCormick* (1862), 11 Mich 68; *Bolds v. Woods, supra*, 663, 665.

Under the allegations of this complaint, “whether such representations as to value are merely the expressions of an opinion, or affirmations of facts to be relied upon, is a question of fact to be determined by the jury,” under proper instructions. *Culley v. Jones, supra*. See, also, *Simar v. Canaday* (1873), 53 N. Y. 298, 13 Am. Rep. 523; *People v. Peckens* (1897), 153 N. Y. 576, 591, 47 N. E. 883; *Ingalls v. Miller* (1889), 121 Ind. 188, 191, 22 N. E. 905; 14 Am. and Eng. Ency. Law (2d ed.) 35, 206.

On the subject of the representations as to the value of the stock, the case at bar, if anything, is stronger than the case of *Grover v. Cavanaugh* (1907), 40 Ind. App. 340, 82 N. E. 604, in which this court said at page 346: “The representa-

tions averred in the complaint before us were not made to induce the extension of credit. *They were representations of material, existing facts that went to establish primarily the value of the property appellees were seeking to sell.*” (Our italics.)

The next alleged error presented by appellant’s points and authorities relates to misconduct of jury. There is no showing by the affidavits in support of this ground of

9. the motion for new trial that some of appellant’s attorneys did not have knowledge of the misconduct complained of before the verdict of the jury was returned. In fact, it appears from the record that the misconduct charged occurred after the jury retired to consider its verdict, and that the court, after being advised of the same, called the jury into the court room, and gave it very proper instructions on the subject; and, in the absence of a showing to the contrary, the presumption which this court always indulges in favor of the regularity of the proceedings in the lower court would cause us, in this case, to presume that both parties to the suit were present either in person or by some of their attorneys when such action was taken by the lower court. This presumption, in this case, is strengthened by the fact that appellant and two of his attorneys in their affidavits each say that he was not present when such action was taken, but do not say that the other counsel for appellant were not present, and such other counsel each make an affidavit in said matter, and are silent on said subject. A very strong showing is made by way of counter-affidavits, to the effect that appellant was not prejudiced in any event; but the controlling influence in our determination of this question is the absence of a showing that none of appellant’s counsel knew of the misconduct charged before the return of the verdict, in time to have moved for a withdrawal of the submission of the cause to the jury.

Under the holdings of this court and the Supreme Court,

the record must show that neither appellant nor his counsel had knowledge of the alleged misconduct before the jury returned its verdict; or, in case they had such knowledge, they must show a sufficient excuse for their failure to interpose seasonable objections to such misconduct. In the absence of such showing, a new trial cannot be granted. *Aurora, etc., Turnpike Co. v. Niebruggee* (1900), 25 Ind. App. 567, 573, 58 N. E. 864; *Fifth Ave. Sav. Bank v. Cooper* (1898), 19 Ind. App. 13, 19, 48 N. E. 236; *Messenger v. State* (1899), 152 Ind. 227, 231, 52 N. E. 147; *Ellis v. City of Hammond* (1901), 157 Ind. 267, 269, 61 N. E. 565; *Cleveland, etc., R. Co. v. Osgood* (1905), 36 Ind. App. 34, 42, 43, 73 N. E. 285.

If, in this case, a motion to withdraw the submission of the cause to the jury had been made and overruled, such ruling of the court would present a very different question; but appellant, having taken the chances of a verdict in his favor, cannot now avoid the effect of one against him on account of misconduct of the jury, known to his counsel prior to the rendition of such verdict. See *Cleveland, etc., R. Co. v. Osgood*, and other cases cited.

Misconduct of counsel for appellee, on account of statements made in the argument of objections made to the introduction of evidence, and in the final argument of the cause, is urged as one of the grounds for new trial. The record discloses no misconduct of this character presented for review by this court, which was not entirely corrected and cured by instructions of the lower court. Finally, it is argued, that the verdict of the jury is not sustained by sufficient evidence, and especially that there was no proof on the question of amount or measure of damages justifying the verdict. On the question of the measure of damages, the instructions given by the court were as favorable to appellant as the law warranted, the court having given, on this subject, all the instructions requested by appellant. There was evidence

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supporting the verdict on all questions material and
 12. necessary to a recovery by appellee. We find no
 error in the record authorizing a new trial of the case.

Judgment affirmed.

Felt, P. J., not participating.

NOTE.—Reported in 95 N. E. 328. See, also, under (1) 2 Cyc. 1017; (2) 2 Cyc. 1016, 1017; (3) 38 Cyc. 1598; (4) 20 Cyc. 128; (5) 2 Cyc. 1016; (6) 20 Cyc. 127; (7) 20 Cyc. 55; (8) 20 Cyc. 124; (9) 3 Cyc. 298; (10, 11) 38 Cyc. 1866; (12) 3 Cyc. 348. As to false representations of value by vendor to influence vendee, see 18 Am. St. 556.

MILLER v. CITIZENS BUILDING AND LOAN ASSOCIATION OF BRAZIL, INDIANA.

[No. 7,544. Filed April 5, 1912.]

1. PLEADING.—*Abatement.*—*Demurrer.*—Where matter in abatement is not pleaded under oath, as required by §§371, 1749 Burns 1908, §§365, 1460 R. S. 1881, the plea is demurrable. p. 133.
2. PLEADING.—*Answer.*—*Matter in Bar of Action.*—*Demurrer.*—*Action Originating Before Justice of the Peace.*—In an action originating before a justice of the peace all matters of defense, except the statute of limitations, set-off, and matters in abatement, are admissible in evidence without being specially pleaded, and sustaining a demurrer to an answer in bar of such action is harmless. p. 133.
3. JUSTICES OF THE PEACE.—*Jurisdiction.*—*Action for Possession.*—*Landlord and Tenant.*—Under §8071 Burns 1908, §5225 R. S. 1881, a justice of the peace has jurisdiction coextensive with the territorial limits of his county, and unlimited as to amount, in an action for possession by the landlord against a tenant unlawfully holding over. p. 134.
4. CONTRACTS.—*Construction.*—*Province of Court.*—Where the contract sued on was in writing, it was in the province of the court to construe same. p. 134.
5. LANDLORD AND TENANT.—*Lease.*—*Agreement of Sale.*—*Validity.*—A lease contract containing a provision for the sale of the premises to the tenant may be enforced. p. 135.
6. LANDLORD AND TENANT.—*Lease.*—*Agreement of Sale.*—*Construction.*—*Relation of Landlord and Tenant.*—A contract, drawn in the form and language common to all lease contracts, with the

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exception that it contains a provision for a sale and conveyance to the party taking possession by virtue thereof, upon his full compliance with its provisions, is in effect a lease creating the relation of landlord and tenant between the parties thereto. p. 135.

7. **APPEAL.—Reversal.—Excessive Damages.**—A cause will not be reversed simply because the damages awarded are excessive, where the amount of such excess is less than one dollar. p. 137.

From Putnam Circuit Court; *John M. Rawley*, Judge.

Action by the Citizens Building and Loan Association of Brazil, Indiana, against Andrew F. Miller. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Albert E. Payne and *Warren E. Payne*, for appellant.

E. S. Holliday and *Frank A. Horner*, for appellee.

MYERS, J.—This was an action commenced by appellee against appellant before a justice of the peace for the possession of certain real estate. Appellee had judgment before the justice, and appellant took an appeal to the Clay Circuit Court. The venue was changed to the court below, where the issues were submitted to a jury, and a verdict returned in favor of appellee for the possession of the real estate described in the complaint, and assessing damages in its favor for the detention thereof. The judgment was in accordance with the verdict.

Appellant's motion for a new trial was overruled, and this ruling and the ruling sustaining a demurrer to appellant's plea in abatement are separately assigned as error.

The matter in abatement was not pleaded under

1. oath, as required by §371 Burns 1908, §365 R. S. 1881, or §1749 Burns 1908, §1460 R. S. 1881, and for that reason the plea was demurrable. The pleading was not in bar, but if so, the sustaining of a demurrer to it was harmless, for the reason that all matters of defense, except
2. the statute of limitations, set-off, and matters in abatement were admissible in evidence, without being specially pleaded. §1749, *supra*; *Gates Lumber Co. v. Todd* (1899), 22 Ind. App. 148, 53 N. E. 385.

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Appellant insists that the justice did not have jurisdiction. Answering appellant's contention in this respect, it is settled by legislative enactment that in actions for the

3. possession of land brought by the landlord against the tenant, who shall unlawfully hold over, the jurisdiction of a justice of the peace is unlimited as to amount, and coextensive with the territorial limits of his county. §8071 Burns 1908, §5225 R. S. 1881; *Scott v. Willis* (1890), 122 Ind. 1, 23 N. E. 786; *Sturgeon v. Hitchens* (1864), 22 Ind. 107.

In this case, the complaint before the justice shows that the relation of landlord and tenant existed, and from the record we learn that the title to the land was not put in issue by plea supported by affidavit, nor did the proof on trial put it in issue, unless it can be said that the contract introduced in evidence was thus effective. Any question in this respect is fully presented by instruction five, given by the court to the jury, and assigned as one of the causes in support of the motion for a new trial. That instruction reads as follows: "The court instructs you that the contract entered into between the plaintiff and defendant and which has been introduced in evidence, creates the relation of landlord and tenant between the plaintiff and defendant, and if you find that defendant took possession of said property under said contract then he became the tenant of the plaintiff in this case." The contract being in writing, it was the province of the court to construe it. It was dated October 2, 1908, and purports to be a lease by appellee to appellant of certain real estate in Clay county, particularly described, for a period of six years and two months from October 1, 1908. By its terms, appellant agreed to pay appellee a yearly rental of \$171, payable in monthly installments of \$14.25, and all taxes and assessments charged against the premises leased, and keep the buildings insured for \$750 during the term of said tenancy. On the expiration of the time of appellant's tenancy, or on his default or

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failure to pay the rental, taxes or premium for insurance when the same shall mature, it was agreed that his tenancy so created shall cease and determine, and appellee shall thereupon have the right to reënter and take possession of said premises. The contract also provides “that upon the full compliance of all the conditions of this contract by said second party [appellant] said first party [appellee] agrees to sell and convey said premises to said second party by a deed containing covenants of warranty; but nothing contained in this contract shall be construed as a contract of sale, and in the event that said second party shall fail to comply with, and perform all the conditions and stipulations of this contract all moneys paid by the terms aforesaid shall be construed as rental for the use of said premises, and shall be forfeited to said first party.”

The contract is one the parties had a right to make and have enforced. While it contains a stipulation whereby

appellee, at a time fixed, agreed to sell and convey the

5. land to appellant, yet the latter’s right in this regard is made to rest on his full compliance with that part of the contract unmistakably a lease, and which, standing alone, creates the relation of landlord and tenant. With the

one exception, the form and language used by the

6. parties are common to all lease contracts, and the legal effect is generally well understood. Therefore, looking at the parties as they appear before us, in connection with their expressed intention, it may be said that their ultimate purpose is plain—one to sell, and the other, ownership of the premises in question. But the agreement to sell was not to be effective until full performance by the lessee of the conditions imposed on him. In this respect he utterly failed.

In the case of *Wright v. Roberts* (1867), 22 Wis. 161, the contract was much more favorable to appellant’s contention than the one at bar, and in that case it was said: “It is true, that in such cases, the primary object of the contract is not to lease the property, but to sell it. But as human affairs

are proverbially uncertain, it is not only competent but reasonable for the parties to anticipate the possible failure of the principal object, and to provide for the relation which they shall hold to each other contingent upon that event.”

In this case, the contract, in effect, expressly provides that appellant shall have and hold possession of the premises as a tenant, and in this particular it is more reasonably susceptible to the construction placed on it, than was the contract before this court in the case of *Baltes Land, etc., Co. v. Sutton* (1900), 25 Ind. App. 695, 57 N. E. 974, which clearly authorized the instruction now under consideration. In that case it was said: “But we know of nothing to prevent the parties from agreeing that, although the contract is originally one of purchase, it may become, under certain conditions therein named, a lease. It is a matter about which the parties might rightfully contract and the contract when made may be enforced. Appellant, as assignee of the contract, went into possession whereby it might ultimately become the owner of the land. It could become such owner only by compliance with the contract, and making the payments therein provided. But it made default in the payment due July, 1898. The contract provided for this default, and from its express terms, appellant having taken possession, the conclusion necessarily follows that the relation of landlord and tenant then existed.”

The provision in the case last cited was again considered by this court in the case of *Prather v. Brandon* (1909), 44 Ind. App. 45, 88 N. E. 700, and there held to “explicitly create the relation of landlord and tenant.” The instruction was not erroneous.

Lastly, it is insisted that the amount of recovery was erroneous, it being too large. It is conceded that there is evidence from which the jury might have found that the rent was paid only to January 1, 1909. The trial was had September 28, 1909. The monthly rental was \$14.25, and the damages assessed, \$128.25. The judgment was entered

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October 8, 1909. The statute, in a case like this, expressly provides that damages “shall be estimated up to the time of each trial.” §8082 Burns 1908, §5236 R. S. 1881. See, also,

White v. Stellwagon (1876), 54 Ind. 186. It may

7. rightfully be said that the verdict of the jury is excessive in a sum less than \$1. But on the whole case, we do not feel justified in reversing the judgment, and sending the cause back for a new trial on an error involving such a small amount.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 70. See, also, under (1) 31 Cyc. 527; (2) 31 Cyc. 358; (3) 24 Cyc. 454; (4) 9 Cyc. 591; (5, 6) 24 Cyc. 1021; (7) 3 Cyc. 445. As to option to purchase given by lessor to lessee, see 118 Am. St. 598. On the question of lease of land as conveyance, see 11 L. R. A. (N. S.) 99. For lease as conveyance within meaning of recording statutes, see 24 L. R. A. (N. S.) 879.

HOLLINGSWORTH v. HOLLINGSWORTH, EXECUTRIX.

[No. 7,545. Filed April 5, 1912.]

1. **APPEAL.—Review.—Judgment.—Against Uncontradicted Evidence.**—Although a judgment of the lower court will not be reversed on the mere weight of testimony, a reversal will be ordered if the judgment is against the uncontradicted evidence. p. 138.
2. **APPEAL.—Review.—Evidence.**—In an action on a claim against an estate for services rendered the decedent, where the substance of the uncontradicted evidence shows that during the period of his last illness, and out of the presence of the claimant, decedent had said that he would rather have the claimant wait on him than anyone else, and that he would see that claimant would be paid for his services if he would stay with him, and a part of the evidence as to the amount of services rendered, and their nature, showed that the services were such as might have been rendered without any thought of or desire for compensation, the finding and judgment of the lower court against the claimant will not be reversed on the theory that the undisputed evidence shows a contract under which some services were rendered. p. 139.
3. **APPEAL.—Review.—Preponderance of Evidence.—Findings.**—The findings of the trial court will not be disturbed on appeal because of any apparent preponderance of the evidence. p. 140.

From Henry Circuit Court; *Ed Jackson*, Judge.

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Action by Carl S. Hollingsworth against Julia Hollingsworth, as executrix of the last will of Joseph R. Hollingsworth, deceased. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Medsker & Medsker, Forkner & Forkner, for appellant.

Barnard & Jeffrey, for appellee.

HOTTEL, J.—This is an action on a claim filed by appellant against the estate of his uncle, Joseph R. Hollingsworth, to recover for services alleged to have been performed for decedent during his illness. Said claim was disallowed by the executrix of the estate, and placed on the docket of the Henry Circuit Court, where a trial by the court, without the intervention of a jury, resulted in a finding and judgment for appellee.

A motion for a new trial filed by appellant was overruled, and this ruling presents the only error assigned and relied on. This court is asked to reverse the judgment of the court below on the evidence, the sufficiency thereof to sustain the decision being the only ground of the motion for new trial discussed.

It is urged by appellant that the uncontradicted evidence shows “that there was a contract that deceased would pay the appellant for his services and * * * that

1. *some* services were rendered which entitled him to *some* amount of compensation.” If appellant be correct in this contention, it would be a denial of justice to permit the judgment to stand. A reversal on such grounds would not be a violation of the rule “that this court will not reverse a judgment of the court below upon the mere weight of testimony.” *Fulmer v. Packard* (1892), 5 Ind. App. 574, 32 N. E. 784; *Butterfield v. Trittipo* (1879), 67 Ind. 338; *Dockerty v. Hutson* (1890), 125 Ind. 102, 25 N. E. 144; *Anderson Glass Co. v. Brakeman* (1898), 20 Ind. App. 226, 47 N. E. 937.

An examination of the evidence in the record discloses

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that there was evidence tending to show that the decedent, during his period of illness, had said that he would

2. rather have Carl (the appellant) to wait on him than any one else, and he would see that Carl would be paid for it as soon as he got able to pay for it, if he would stay there.

This quotation from the testimony of appellant's father is the substance of all the evidence introduced for the purpose of establishing the alleged contract or agreement. Two or three other witnesses testified substantially to the same language used by decedent, and this evidence was uncontradicted. It was not claimed by any of the witnesses testifying to such language that the same was used in the presence of appellant, and no definite time, with reference to the services rendered, was fixed by any witness as to when the conversation with decedent was had. The evidence as to the amount of services rendered and their nature is conflicting. According to the testimony of several of the witnesses, who were in a position to see and know, the character and the amount of the services rendered by appellant were such as might have been gratuitously rendered by any neighbor or friend, especially by a relative, without any thought of or desire for compensation.

Appellant makes his mistake in assuming that the undisputed evidence shows a contract or agreement under which some services were rendered. While the statement of the decedent, showing his appreciation of the services and an intention to pay for the same, would have justified the court in finding that such services were rendered by appellant under an agreement by which he expected to be, and was entitled to be, paid therefor, such evidence did not necessitate such conclusion, and the court, considering the evidence as a whole, may have concluded that the services actually rendered by appellant were gratuitously rendered, without any present intent of charging for the same, and, in fact, without any knowledge of the expressed intention of decedent

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that he should be paid therefor. The uncontradicted evidence does not therefore conclusively show that the particular services, or any part thereof, for which appellant sought a recovery, were rendered with an understanding that such services would be paid for.

The trial court, with an opportunity to weigh the conflicting evidence and to observe the conduct and manner of the several witnesses, has found that appellant is not
3. entitled to compensation for his alleged services, and this court cannot disturb such finding because of any apparent preponderance of the evidence. *Williams v. Chapman* (1903), 160 Ind. 130, 132, 66 N. E. 460; *Seisler v. Smith* (1898), 150 Ind. 88, 90, 46 N. E. 993; *Hamilton v. Hanneman* (1898), 20 Ind. App. 16, 22, 50 N. E. 43; *Schieber v. Traudt* (1898), 19 Ind. App. 349, 356, 49 N. E. 605.

It cannot be said that there was no evidence to support the decision of the court, and the judgment will, therefore, be affirmed.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 79. See, also, under (1) 3 Cyc. 362; (2) 18 Cyc. 532, 1029; (3) 3 Cyc. 364. As to the presumption that services rendered by relatives are gratuitous, see 138 Am. St. 250.

LAGRANGE v. COYLE ET AL.

[No. 7,564. Filed April 5, 1912.]

1. **BILLS AND NOTES.—Action.—Material Alterations.—Answer.—Sufficiency.**—In an action on a promissory note, a sworn paragraph of answer admitting the execution and delivery of the note sued on, but alleging that after the signing and delivery, and without the consent or knowledge of defendant, the same was materially altered and changed by inserting certain words in the body thereof, so that the note sued on was not in terms the note executed, was sufficient as against a demurrer without alleging that the alteration of the note was made by the party claiming under it. p. 144.
2. **BILLS AND NOTES.—Material Alterations.**—Unauthorized alterations of a note, which vary the legal effect thereof to the advantage of the person making such alterations, are sufficient to avoid the contract. p. 144.

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3. PLEADING.—*Cross-Complaint.—Founded on Written Instrument.—Sufficiency.*—Where a cross-complaint is founded on a written warranty, it will be insufficient unless the instrument is set out in the body thereof or is made an exhibit thereto. p. 145.
4. SALES.—*Warranty.—Consideration.—Pleading.—Answer.*—A warranty of the thing sold, made at the time of the sale, is a part of the entire contract, and the price paid for the subject of the sale constitutes the consideration for the warranty, so that in an action on a note for the purchase price of a horse an answer setting up a breach of warranty was not open to the objection that no consideration for the warranty was shown. p. 145.
5. SALES.—*Warranty.—Breach.—Answer.—Sufficiency.*—In an action on a note given for the purchase price of a stallion, an answer setting up a breach of warranty was insufficient for failure to allege what the services of the horse were worth or that he was less valuable than if he had been as warranted. p. 145.
6. SALES.—*Warranty.—Breach.—Remedy.*—It is the general rule that, in the absence of fraud, the breach of warranty of personal property unconditionally sold will not give to the purchaser a right to rescind the contract, but his remedy is by original action on the warranty, or he may set it up by counterclaim, or rely upon it as a defense in an action for the purchase money. p. 145.
7. SALES.—*Action for Purchase Price.—Defense.—Breach of Warranty.*—Where a breach of warranty is relied on as a complete defense, it must be made to appear that the damages sustained on account of the breach are equal to the amount of plaintiff's claim, or that the article was of no value for any purpose. p. 146.

From Superior Court of Marion County (74,555); *George F. Mull*, Special Judge.

Action by Jasper W. LaGrange against George W. Coyle and another. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Mark H. Miller Robert M. Miller and Henry C. Barnett, for appellant.

John M. Wall, William W. Spencer and Edwin W. Spencer, for appellees.

IBACH, P. J.—This was an action by appellant against appellees upon a promissory note in the following words and figures:

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“Franklin, Ind., Sept. 19, 1904.

Nov. 1, 1906 — after date we promise to pay to the order of J. W. LaGrange two hundred dollars, negotiable and payable at the Franklin National Bank, Franklin, Ind., with six percent interest after date until paid, and reasonable attorney's fees; value received, without any relief whatever from valuation or appraisal laws. The drawers and endorsers severally waive presentment for payment, protest and nonpayment of this note, and all defense on the ground of any extension of time of its payment that may be given by the holder or holders to them or either of them. The express conditions of the sale and purchase of the stallion Aulton Boy, for which this note is given, is such that the title, ownership or possession does not pass from the said J. W. LaGrange until this note and interest is paid in full, and if the same should become due and remain unpaid, or any portion of the same horse, I, G. W. Coyle, hereby authorize J. W. LaGrange, or his agent, to enter upon my premises and take possession of the said horse, or wherever it may be found, and any payment that shall have been made shall be considered compensation for the use of said horse.

Post office, P. O. Indpls.
Address, Township—Haughville Sta.—
R. R. 18.

G. W. Coyle,
Paul Kraft.”

\$200.

Appellee Coyle filed a cross-complaint which declared on the breach of a written instrument of warranty, executed to him at the time of the purchase of the horse and the execution of the note, guaranteeing the horse to be a sound, well-bred stallion, capable of begetting colts, alleged that he was impotent and unable to perform the duties for which he was purchased, and asked \$500 in damages for expense in feed and care of him.

Both appellees filed an amended third paragraph of answer, which alleged, in substance, that the note sued on was given by appellees in payment for a certain stallion named Aulton Boy, sold to appellee Coyle at about the time of the execution of said note. At the time of the delivery of the

horse to Coyle, and the delivery of the note to plaintiff, plaintiff executed and delivered to Coyle the following instrument.

“Franklin, Ind., Sept. 23, 1904.

We guarantee the horse Aulton Boy to be a reasonably sure breeder.

W. H. LaGrange & Son.”

The son named in the signature of the instrument is the plaintiff. Said horse was not a reasonably sure breeder, and did not perform and was unable to perform the duties of a stallion as guaranteed by said plaintiff, and he failed to beget colts, and out of eighty-seven services by said stallion only five colts were begotten by him. Defendant Coyle was at the expense of \$500 in the care and keep of said horse, and said horse was and is worthless as a stallion. As soon as the first season was over, and defendant learned that said horse had not begotten colts, as hereinbefore alleged, sometime in May, 1906, he tendered said stallion back to the plaintiff, and demanded a surrender of said note, and plaintiff then refused to take back the horse or surrender the note, and still refuses. Defendants pray for a surrender and cancellation of the note.

Each of appellees filed a separate sworn fifth paragraph of answer, admitting the signing of the note sued on, and its delivery to the plaintiff, but alleging that after the signing and delivery, and without the consent or knowledge of appellees, the note “was altered and changed in manner following, to wit: the words ‘stallion,’ ‘Aulton Boy,’ ‘J. W. LaGrange,’ ‘G. W. Coyle,’ ‘horse,’ ‘horse,’ were inserted in the body of said note. That said changes so made were material alterations of the note, and the note sued on is not in terms the note executed by appellees.”

It is relied on for reversal that the court erred in overruling appellant’s separate demurrers to the cross-complaint, amended third paragraph of answer, and separate fifth paragraphs of answer.

The separate fifth paragraphs of answer are good. "Where an instrument is altered after its execution, it will be presumed until the contrary is shown, that the altera-

1. tions were made by the party claiming under it, or by one under whom he claims, and it is not necessary in an answer stating that an instrument sued on has been altered, to allege that it was altered by the party claiming under it, or by one under whom he claims." *Bowman v. Mitchell* (1881), 79 Ind. 84, 6 L. R. A. 469. See, also, *Palmer v. Poor* (1889), 121 Ind. 135, 22 N. E. 984.

The alterations alleged were sufficient to avoid the contract. "If while a written contract remains executory, a party unauthorized so alters it as to vary its legal effect to his

2. advantage, whether he meditates a fraud or not, then at the election of the other party, he is estopped from relying upon it in a court of justice. Plainly in reason, after a party has intentionally altered the contract, thus abandoning it in its original form, he can not before the tribunal reclaim what *in pais* he had cast aside; and he can not rely on the new form of words, because to them the other party had not consented." Bishop, *Contracts* (2d ed.), §§746, 747. See, also, *Coburn v. Webb* (1877), 56 Ind. 96, 100, 26 Am. Rep. 15. "Any change which makes a new stipulation or condition in the contract of the parties is material, as a stipulation waiving the benefit of a legal defense or exemption, or a stipulation in a note retaining a lien upon land." 2 Cyc. 193. See, also, *McDaniel v. Whitsett* (1896), 96 Tenn. 10, 33 S. W. 567. The alterations alleged in the case at bar certainly very materially changed the contract between the parties from an ordinary promissory note to a contract more advantageous to appellant, containing the additional provisions that title, ownership and possession of the horse, Aulton Boy, should be retained by appellant until the note was paid.

The cross-complaint was bad, and the demurrer thereto should have been sustained. "When any pleading is

founded on a written instrument or on account, the
3. original, or a copy thereof, must be filed with the pleading.” §368 Burns 1908, §362 R. S. 1881. This cross-complaint was founded on a written warranty, and does not set out the written instrument, either in the body of the pleading or as an exhibit.

The amended third paragraph of answer proceeds on the theory of total failure of consideration for the note by reason of a breach of warranty.

It is not open to the objection that no consideration for the warranty is shown. “When it [a warranty] is made at the time of a sale, it is a part of the entire contract,
4. and the price paid for the subject of the sale constitutes the consideration for it.” 30 Am. and Eng. Ency. Law (2d ed.) 132.

But this paragraph is fatally defective for failure to allege that the horse was depreciated in value because he was not
“a reasonably sure breeder,” as guaranteed. It is
5. averred that his care and keep amounted to \$500, but it does not appear what his services were worth, nor that he was less valuable than if he had been as warranted. It is alleged that he was worthless as a stallion, but not that he was valueless.

Appellee insists, however, that since there was a sale of the horse with a warranty, and defendant offered to return the horse, this fact, considered with the other facts pleaded, is sufficient to show a total failure of consideration for the note.

There is no allegation of fraud in connection with the sale, neither does it appear that there was any agreement between the parties permitting a rescission of the contract by a
6. return of the property in case of a breach. The general rule is that a breach of warranty of personal property, which was unconditionally sold, in the absence of fraud, will not give to the purchaser a right to rescind the

contract. The injured party's remedy in such a case is to bring his original action on such warranty, or he may set it up by counterclaim. *Marsh v. Low* (1876), 55 Ind. 271; *Ohio Thresher Engine Co. v. Hensel* (1894), 9 Ind. App. 328, 36 N. E. 716; *Hoover v. Sidener* (1884), 98 Ind. 290; *Price v. Huddleston* (1906), 167 Ind. 536, 79 N. E. 496. Or it may be relied on as a defense in an action for the purchase money, and where the breach of warranty is relied on

7. as a complete defense, it must be made to appear that the damages sustained on account of such breach are equal to the amount of plaintiff's claim, or that such article was of no value for any purpose. The allegation that the horse was of no value as a stallion is not sufficient, although coupled with the allegation that the horse was tendered back and the tender refused. *Price v. Huddleston, supra*; *A. D. Baker Co. v. Cornelius* (1911), 47 Ind. App. 1, 93 N. E. 686; *Booher v. Goldsborough* (1873), 44 Ind. 490; *Smith v. Borden* (1903), 160 Ind. 223, 66 N. E. 681; *Merchants, etc., Sav. Bank v. Frazee* (1894), 9 Ind. App. 161, 166, 36 N. E. 378, 53 Am. St. 341.

We find some early cases which seem to be out of line with the present holding, but they have been modified to such an extent by the later decisions that we are precluded from following them.

The judgment is reversed, with directions to sustain the demurrers to appellee Coyle's cross-complaint, and to appellees' amended third paragraph of answer, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 98 N. E. 75. See, also, under (1) 2 Cyc. 232; (2) 8 Cyc. 92; (3) 31 Cyc. 227; (4) 35 Cyc. 449; (5) 35 Cyc. 452; (6) 35 Cyc. 434; (7) 35 Cyc. 451. As to what amounts to breach of warranty of soundness of horse, see 32 L. R. A. (N. S.) 182. As to breach of warranty in sales of horses and cattle for breeding purposes, see 102 Am. St. 622.

**CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. FEDERLE, GUARDIAN.**

[No. 7,575. Filed April 5, 1912.]

1. **APPEAL.—Motion for Directed Verdict.—Manner of Presenting Question.**—No question is presented by an independent assignment that the court erred in overruling a motion for directed verdict at the close of the evidence, but the alleged error should be included in the motion for a new trial. p. 150.
2. **RAILROADS.—Crossing Accident.—Proximate Cause.—Complaint.—Sufficiency.**—Where it appears from the averments of the complaint, in an action for injuries received in a crossing accident, that plaintiff's ward approached the crossing from the north in a heavily loaded wagon, that he stopped, looked and listened, but neither seeing nor hearing anything, entered upon the track and then saw a rapidly approaching train, that his only means of escape was to go down the south approach to the crossing which defendant had negligently constructed on a forty per cent grade, of loose, unpacked sand and gravel, that it was dangerous and its condition unknown to plaintiff's ward, that in going down said approach said ward was thrown from his wagon and injured, the complaint sufficiently shows that the fall and injury alleged were the proximate result of the negligent construction of the crossing. p. 150.
3. **TRIAL.—Verdict.—Answers to Interrogatories.—Conflicting Answers.—Effect.**—Where answers by the jury to certain interrogatories are in conflict with its answers to other interrogatories, their effect is thereby nullified and rendered unavailing to overthrow the general verdict. p. 152.
4. **RAILROADS.—Crossing Accident.—Dangerous Crossing.—Contributory Negligence.**—Even though one may know that there is danger in driving over a railroad crossing, he is justified in proceeding if in so doing he uses such care and caution as a person of ordinary prudence, in like place, would deem sufficient successfully to guard against the threatening danger. p. 152.
5. **RAILROADS.—Crossing Accident.—Negligence.—Proximate Cause.—Evidence.—Sufficiency.**—In an action against a railroad company for injuries to plaintiff's ward, evidence showing that at the time of the injury defendant was engaged in reconstructing its road so that the grade of the south approach to the crossing where the injury occurred had been increased from about four per cent to about forty per cent, and so as to leave an abrupt drop of four or five inches from the level of the crossing to the highway and that the defendant had lessened the

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width of the highway along the approach from thirty feet to about nine feet and covered it with loose gravel into which vehicles sank as they passed over it, and that plaintiff's ward in driving from the track onto the south approach suddenly pitched downward and fell from his wagon and was injured, was sufficient to warrant the jury in finding the construction of the crossing and approach to have been negligent and that the fall and injury were caused by the slope and by the wheels of the wagon suddenly sinking into the loose gravel thereof. pp. 154, 155.

6. RAILROADS.—*Crossings.—Duty to Maintain in Good Condition.*—Both at common law and by statute it is the duty of a railroad company to keep the crossings of highways and the approaches thereto in good condition for public travel. p. 155.
7. RAILROADS.—*Crossing Accident.—Requirement as to Ordinary Care.—Instruction.*—In an action for injuries sustained in being thrown from a wagon while driving over a defective railroad crossing, an instruction which told the jury that the injured person was bound to use reasonable care and caution to avoid injury, and that the degree of care and caution required of him was such as would have been reasonably proportionate to the known difficulty and danger in crossing, was not misleading and was sufficient to inform the jury that he was required to use the care an ordinarily prudent and cautious person would use under like circumstances to avoid injury and that such care is always proportionate to the known danger. p. 155.
8. APPEAL.—*Harmless Error.—Instructions.*—The inadvertent use of the word "plaintiff" instead of "plaintiff's ward" in instructions is not reversible error where it does not appear that that could or did in any way mislead the jury. p. 156.
9. APPEAL.—*Review.—Harmless Error.—Instructions.*—In an action for personal injuries sustained in being thrown from a wagon while driving over a defective railroad crossing, where an examination of the testimony shows nothing that could have been considered "under the evidence" except elements of compensation for the alleged injury, and the size of the verdict indicates that nothing speculative or improper entered into it, an instruction was harmless, although perhaps technically incorrect, which called attention only to elements of actual damage to be considered, if shown by the evidence, and concluded by stating that the injured party should be awarded such damages as he was "fairly entitled to" under the evidence. p. 156.
10. TRIAL.—*Instructions.—Refusal.—Covered by Other Instructions.*—It was not error to refuse instructions tendered by appellant that were in substance covered by instructions given by the court. p. 157.

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11. **INSANE PERSONS.—Action by Guardian.—Evidence.—Record of Adjudication of Insanity.**—In an action by the guardian of an insane ward to recover for injuries sustained by the ward, the probate order book showing the adjudication of the mental unsoundness of plaintiff's ward was competent to prove plaintiff's authority to bring the suit. p. 157.
12. **INSANE PERSONS.—Action by Guardian.—Evidence.—Record of Adjudication of Insanity.—Admission.—Objection.**—In an action by the guardian of an insane ward to recover for injuries sustained by the ward, where defendant objected to the admission of the probate order book showing the adjudication of the mental unsoundness of plaintiff's ward on the ground that the record was not competent evidence because defendant was not a party to the proceedings and that, if it was admitted in evidence, parol evidence of the mental condition of the ward could not be received, but admitted that the record was competent evidence to prove the authority of plaintiff to bring the suit, the objection was properly overruled. p. 157.
13. **APPEAL.—Evidence.—Limiting Application.—Presenting Question.**—Where evidence was properly admitted for one purpose no question is presented as to its competency for another purpose, where appellant failed to tender an instruction limiting its application. p. 157.
14. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.—Cumulative Evidence.**—In an action to recover for injuries to plaintiff's ward, where there was other evidence showing the ward's mental condition to be impaired as the result of his injury, and the defendant introduced no evidence whatever on the question, the admission in evidence of the probate order book showing an adjudication of the ward's mental unsoundness was merely cumulative and harmless. p. 158.

From Ripley Circuit Court; *Francis M. Thompson*, Judge.

Action by William Federle, as guardian of Joseph Federle, a person of unsound mind, against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

L. J. Hackney, F. L. Littleton, J. O. Cravens and *T. S. Cravens*, for appellant.

Nicholas Cornet, John B. Rebuck and *R. H. Jackson*, for appellee.

FELT, C. J.—Appellee brought this action to recover damages for injuries alleged to have been sustained by his ward on a public highway crossed by appellant's road, and caused by the negligent construction of the approaches of said highway at said crossing.

The case was tried by a jury, which returned a verdict for appellee in the sum of \$1,000, together with answers to interrogatories. From judgment in favor of appellee, this appeal was granted. Appellant assigns error in the overruling of (1) the demurrer to the amended second paragraph of supplemental complaint, (2) the motion for directed verdict at the close of the evidence, (3) appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict, (4) the motion for a new trial.

Appellant's second alleged error presents no question as an independent assignment, but is properly included in the motion for a new trial. *Chicago, etc., R. Co. v. Rich-*

1. *ards* (1901), 28 Ind. App. 46, 59, 61 N. E. 18; *Rhodius v. Johnson* (1900), 24 Ind. App. 401, 403, 56 N. E. 942.

In support of its first proposition, appellant con-
2. tends that appellee's complaint is defective as against demurrer, in that it fails to show any causal connection between the negligence complained of and the injuries sustained by appellee's ward.

From the averments of the complaint it appears that on December 27, 1906, and for some time prior thereto, defendant was engaged in elevating its tracks and reconstructing its roadbed at a place where said tracks crossed a public highway; that on said date plaintiff's ward, Joseph Federle, while driving with a loaded wagon along said highway, approached said crossing from the north; that he stopped, looked and listened for an approaching train, but neither saw nor heard any; that he drove upon the railroad track, and then saw a train approaching him from the east at a

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high rate of speed; that because said crossing was only nine feet wide instead of thirty feet, the width of the highway, he could not turn to either side, and on account of the rapidly approaching train he could not stop; that he was thus forced to continue on his way and go down the south approach to the crossing; that said south approach was constructed on a forty per cent grade, and was built of loose, unpacked sand and gravel; that it was in a dangerous condition, and said dangerous condition was unknown to plaintiff's ward; that in going down said approach said ward was thrown from his wagon, and so injured that he became of unsound mind. The complaint further charges defendant with the negligent construction of said crossing and approach, and alleges that "all of which happenings were occasioned solely by the carelessness and negligence of defendant," and that "on account of said happenings" plaintiff's ward was injured.

It thus appears that said ward used due caution as he approached appellant's tracks; that he knew of no defects in the construction of the highway beyond the railroad; that when he drove upon said tracks, and saw the approaching train, he did the natural, and only possible thing, under the circumstances, when he drove down the south approach; that he had no time to inspect the same, but was forced to use it as he found it, or be struck by the train; that he drove down the steep approach, was thrown from his wagon and injured.

The form and character of the averments of the complaint, relied on to show that the alleged negligence of appellant in constructing the crossing and the south approach thereto caused the injury complained of, are not to be commended, yet, considering all the facts averred, we are forced to the conclusion that the fall and injury alleged were the proximate result of the negligent construction aforesaid. *Vandalia Coal Co. v. Price* (1912), 178 Ind. —, 97 N. E. 429, 431; *Cleveland, etc., R. Co. v. Stevens* (1912), 49 Ind. App.

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647, 96 N. E. 493, 494; *Pennsylvania Co. v. Sears* (1894), 136 Ind. 460-465, 34 N. E. 15, 36 N. E. 353.

Appellant contends that its motion for judgment on the answers to the interrogatories notwithstanding the general verdict should have been sustained, for the reason that

3. the jury in answer to interrogatory twenty-one found that it was dangerous for appellee's ward "to drive down the approach to the south track seated on a loose board lying across strips nailed leangthwise on the top of a farm wagon," and in answer to interrogatory twenty-two, found that the danger was open and obvious to one driving down the approach to the south tracks so seated on the top of a farm wagon.

But in answer to interrogatories seventeen, eighteen and twenty, the jury also found that appellee's ward had his horse under control; that travelers on the highway in question could not drive over the approach to the south track in safety by using ordinary care, and that the danger in driving over said approach was not open and obvious. It can not be seriously contended that the position of appellee's ward on his wagon was a negligent or unsafe position for him to assume, nor that it gave him any better opportunity to observe the danger ahead than that which any other traveler possessed. It follows, then, that so far as the jury's answers to the interrogatories are favorable to appellant they are in conflict with other answers, and their effect is thereby nullified and rendered unavailing to overthrow the general verdict. *Pittsburgh, etc., R. Co. v. Lightheiser* (1907), 168 Ind. 438, 448, 78 N. E. 1033; *Richmond St., etc., R. Co. v. Beverly* (1909), 43 Ind. App. 105, 110, 84 N. E. 558, 85 N. E. 721; *Union Traction Co. v. Vandercook* (1904), 32 Ind. App. 621, 625, 69 N. E. 486.

Even though appellee's ward knew there was danger in driving over the crossing, it did not necessarily fol-

4. low that injury would result, and under such circumstances, and particularly in view of the fact that said

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ward's position on appellant's track was one of positive danger on account of the approaching train, he was justified in proceeding, if he used such care and caution as "a person of ordinary prudence, in like place, would deem sufficient successfully to guard against the threatening danger." *Chicago, etc., R. Co. v. Leachman* (1903), 161 Ind. 512, 516, 69 N. E. 253; *Town of Gosport v. Evans* (1887), 112 Ind. 133, 138, 13 N. E. 256, 2 Am. St. 164.

As against the interrogatories, the general verdict finds in appellee's favor every fact provable under the issues. This includes the finding that his ward exercised care commensurate with the apparent danger of the situation, and acted in a cautious and prudent manner.

In the case of *Chicago, etc., R. Co. v. Leachman, supra*, on page 516 it is said: "There is no question of assumed risk in this case, however well appellee knew of the defective condition of the crossing. Appellant, in the construction of its railroad, having intersected an established highway, it became its imperative statutory duty to restore the highway, thus intersected, to its former state, or in a sufficient manner not unnecessarily to impair its usefulness, and in such manner as to afford security for life and property. §5153 Burns 1901, clause 5 [§5195 Burns 1908, Subdv. 5, §3903 R. S. 1881]; *Chicago, etc., R. Co. v. State, ex rel.* [1902], 158 Ind. 189, 191, and cases cited. Whatever danger or risk, obvious or otherwise, resulted from the failure of appellant to perform its specific statutory duty to keep the crossing safe and in good condition for travel, was assumed by appellant, who wrongfully created it, and not by appellee. The appellee is answerable only for his conduct in dealing with the defective conditions as he found them. As relates to him the question is: (1) Was it negligence to undertake, at all, to drive his team and load over the crossing in its known condition, and (2) if he might reasonably undertake it, in his effort to do so, did he neglect the observance of any care or precaution required by ordinary prudence under the circumstances?

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If he might rightfully undertake to cross, and he used such care as an ordinarily careful and cautious person would observe in driving a like team and load over the crossing, he cannot be adjudged guilty of fault.” See, also, *Evansville, etc., R. Co. v. Crist* (1889), 116 Ind. 446, 451, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. 865; *Evansville, etc., R. Co. v. Marohn* (1893), 6 Ind. App. 646, 652, 31 N. E. 27.

The court did not err in overruling the motion for judgment on the answers to the interrogatories.

In discussing its motion for a new trial, appellant contends that the evidence is insufficient to sustain the verdict, in that it fails to show, (1) that appellant’s construction of the crossing and the approaches was, under the circumstances at the time, negligent, (2) that the construction or condition of the crossing, or its approach, or any negligence of appellant was the proximate cause of the injuries of appellee’s ward.

There was evidence tending to show that at the time of the injury to appellee’s ward, appellant was engaged in reconstructing its roadbed, in raising its tracks at the

5. highway crossing near which the accident occurred, and in putting in a new track at said crossing. In the course of these alterations, and in consequence of the elevation of the tracks, the grade of the south approach had been materially increased from about four per cent. to about forty per cent.; that as one approached the crossing from the north, and passed over the tracks, there was an abrupt drop of some four or five inches from the level of the crossing to the highway on the south side, and then a sharp descent over the south approach for some twelve or fifteen feet to the natural elevation of the highway; that in the work of reconstructing the highway along this approach, it had been lessened in width from about thirty feet to about nine feet, and covered with loose unpacked gravel, into which vehicles sank as they passed over it. It further appears from the evidence that appellee’s ward crossed the

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tracks in safety, and then as he drove on to the south approach was seen to pitch suddenly downward and fall from his wagon. He was found on his hands and knees by the side of his wagon, crawling and trying to get up. Several physicians testified that the injuries which he received in the fall were sufficient directly to produce this mental unsoundness, which is relied on as an element of damage.

Both at common law and by statute it was appellant's duty to keep and maintain the crossing of the highway and

the approaches thereto in good condition for public

6. travel. §5195 Burns 1908, subd. 5, §3903 R. S. 1881; *Evansville, etc., R. Co. v. Allen* (1905), 34 Ind. App. 636, 642, 73 N. E. 630; *Lake Shore, etc., R. Co. v. McIntosh* (1895), 140 Ind. 261, 277, 38 N. E. 476.

The evidence in this case shows that appellant violated this duty, in that it constructed the south approach to its tracks on a steep grade, of an insufficient width, and

5. covered the same with loose, unpacked gravel. There is evidence from which the jury may have found that the construction complained of was negligent, and that the fall of appellee's ward from his wagon and his injury were caused by the slope of the south approach, and by the wheels of his wagon suddenly sinking into the loose gravel thereof.

Instruction five, as given by the court and complained of by appellant, is as follows: "If the jury believe from the evidence that where the public highway crossed the

7. railroad track, and where the accident happened, if it did happen, was a difficult place to cross with a loaded wagon, drawn by the team of horses and that Joseph Federle was acquainted with the place and the difficulty of crossing, then he was bound to use reasonable care and caution to avoid injury, and that the degree of care and caution required of him was such as would have been reasonably proportionate to the known difficulty and danger in crossing."

The decedent was required to use the care an ordinarily prudent and cautious person would use under like circum-

stances to avoid injury. Such care is always proportionate to the known danger.

The language of the foregoing instruction is not the most apt to convey this meaning, but the instruction fairly interpreted, is subject to no other meaning and could not have misled the jury.

Instructions seven and ten, as given by the court, show an inadvertence by speaking of the "plaintiff," instead of the "plaintiff's ward." It does not appear that such technical defect could or did in any way mislead the jury, and no reversible error is thereby presented. §§407, 700 Burns 1908, §§398, 658 R. S. 1881; *Cleveland, etc., R. Co. v. Miller* (1905), 165 Ind. 381, 387, 74 N. E. 509.

Instruction twelve, as given by the court, is as follows: "If your finding should be for the plaintiff you will take into consideration in estimating the amount of damages, the amount of doctor bill, if any, his care and nursing, if any has been shown, loss of time, if any, together with loss of ability to earn money, if any has been shown, and you will award him such damages as under the evidence you think him fairly entitled to." This instruction is criticised as not limiting the recovery to compensatory damages. The court, in the instruction, calls attention only to elements of actual damage to be considered, if shown by the evidence, and concludes by stating that he should be awarded such damages as he is "fairly entitled to" under the evidence.

While the instruction may be technically incorrect, it, in effect, limits the damages to compensation for loss, occasioned by the alleged injury. The jury could not reasonably have understood from its language that it could award damages for elements of loss different from those mentioned in the instruction. Furthermore, an examination of the testimony shows nothing that could have been considered "under

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the evidence'' except elements of compensation for the alleged injury, and the size of the verdict indicates that nothing speculative or improper entered into the verdict. In this situation appellant could not have been harmed by the instruction.

Appellant's instructions two, three, four and seven
10. were, in substance, covered by instructions given by the court, and there was no error in refusing them.

Appellee offered in evidence the probate order book, showing the adjudication of the mental unsoundness of appellee's ward. Appellant objected, on the ground that the

11. record was not competent evidence, because appellant was not a party to the proceedings, and that if admitted in evidence parol evidence of the mental condition of the ward could not be received, but admitted that the record was competent evidence to prove the authority of

12. appellee to bring the suit. The objection was overruled, and the record read in evidence without further comment or statement. The record was at least competent for the purpose admitted by appellant, and the objection was properly overruled on that account, and likewise by reason of the admission of counsel.

If for any reason appellant believed the evidence
13. so admitted should be limited in its application, it should have presented to the court a proper instruction on the subject, but this the record shows was not done.

In this situation we are not called on to decide whether the record so admitted was or was not competent evidence, in this case, of the mental condition of appellee's ward. 22 Cyc. 1133; 1 Greenleaf, Evidence (Lewis's ed.) §556; 2 Elliott, Evidence §1372; *Small v. Champeny* (1899), 102 Wis. 61, 78 N. W. 407; *Den v. Clark* (1828), 10 N. J. L. 258, 18 Am. Dec. 417; *Andrews v. Andrews' Committee* (1905), 120 Ky. 718, 721, 87 S. W. 1080, 90 S. W. 581.

The court clearly instructed the jury that before mental

unsoundness, if shown, could be considered in estimating damages, it must be shown to have resulted from the alleged injury.

Furthermore there was other evidence tending to show the impaired condition of the ward's mind subsequent to his injury, and the testimony of several physicians that

14. such infirmity was the natural and probable result of the alleged injuries. Appellant introduced no evidence whatever on the question of the ward's insanity and therefore was not harmed by the admission in evidence of the probate record, for if considered upon the question of the mental condition of the ward, it was only cumulative evidence upon the subject. *Hauck v. Mishawaka Woolen Mfg. Co.* (1901), 26 Ind. App. 513, 60 N. E. 162; *Indiana Union Traction Co. v. Scribner* (1911), 47 Ind. App. 621, 93 N. E. 1014, 1020.

The record presents no reversible error. It having been made to appear that appellee's ward has died since the submission of this cause, the judgment is therefore affirmed, as of the date of the submission.

- NOTE.—Reported in 98 N. E. 123. See, also, under (1) 2 Cyc. 999; (2) 33 Cyc. 1053; (3) 38 Cyc. 1926; (4) 33 Cyc. 985; (5) 33 Cyc. 1090; (6) 33 Cyc. 925; (7) 33 Cyc. 1138; (8) 38 Cyc. 1595; (9) 38 Cyc. 1814; (10) 38 Cyc. 1711; (12) 38 Cyc. 1388; (13) 38 Cyc. 1756; (14) 38 Cyc. 1419. As to a railroad company's liability for a person's injuries due to negligent construction or maintenance by it of a highway crossing, see 90 Am. Dec. 58.

JONES v. KOLMAN ET AL.

[No. 8,223. Filed April 5, 1912.]

1. NEW TRIAL.—*Action for New Trial.—Nature.*—An action for a new trial is an independent action, in no manner connected with the proceeding in which the judgment was rendered, and must stand or fall upon its own merits. p. 160.
2. NEW TRIAL.—*Action for New Trial.—Complaint.—Demurrer.*—The sufficiency of a complaint in an action for a new trial may be challenged by demurrer. p. 160.

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3. **APPEAL.—Final Judgment.—Order Granting New Trial.**—An order granting a new trial under the provisions of §589 Burns 1908, §562 R. S. 1881, is a final judgment within the meaning of §671 Burns 1908, §632 R. S. 1881, from which an appeal will lie. p. 160.

4. **NEW TRIAL.—Action for New Trial.—Complaint.—Sufficiency.**—A complaint in an action for a new trial under §589 Burns 1908, §562 R. S. 1881, is insufficient if it fails to show that diligence was used to ascertain the facts relied upon during the term at which the judgment was rendered, or, if such facts were known, that they were not brought to the attention of the court by reason of the excusable neglect of the party seeking the new trial, or by the fraud of the adverse party. p. 161.

From Orange Circuit Court; *Thomas B. Buskirk*, Judge.

Action by Harrison J. Kolman and others against Oliver W. Jones. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

Carlos T. McCarty, for appellant.

Harry E. Roberts, for appellees.

ADAMS, J.—On September 14, 1910, being the third judicial day of the September term of the Orange Circuit Court, judgment was rendered in favor of appellant against appellees on a note, and decreeing the foreclosure of a mortgage on real estate securing the same. On October 15, 1910—the same being in vacation—appellees filed their motion for a new trial. While the paper filed was designated as a “motion”, it was treated by the parties and by the court as a complaint for a new trial.

Appellant appeared by counsel, and demurred to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and appellant declining to plead further, the court rendered judgment for a new trial.

Appellees have filed a motion in this court to dismiss the appeal, for the reason that the same was not taken from a final judgment, as provided by §671 Burns 1908, §632 R. S. 1881. It is urged that the granting of a new trial by the

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court reinstates the foreclosure proceedings as an action pending in the Orange Circuit Court, and that such action remains undetermined. There is no merit in appellee's motion to dismiss the appeal. A complaint for a new

1. trial is an independent action, and in no manner connected with the proceeding in which the judgment was rendered, and must stand or fall on its own merits. *Davis v. Davis* (1896), 145 Ind. 4, 43 N. E. 935; *Morrison v. Carey* (1891), 129 Ind. 277, 28 N. E. 697; *Hiatt v. Ballinger* (1877), 59 Ind. 303; *Sanders v. Loy* (1873), 45 Ind. 229; *Louisville, etc., R. Co. v. Vineyard* (1907), 39 Ind. App. 628, 79 N. E. 384; *East v. McKee* (1895), 14 Ind. App. 45, 42 N. E. 368. The sufficiency of the complaint in such
2. an action may be challenged by demurrer. *Hines v. Driver* (1885), 100 Ind. 315.

- An order granting a new trial, as provided by
3. §589 Burns 1908, §562 R. S. 1881, is a final judgment within the meaning of §671, *supra*, from which an appeal will lie. Freeman, Judgments §18; *Harvey v. Fink* (1887), 111 Ind. 249, 12 N. E. 396; *Hines v. Driver* (1883), 89 Ind. 339.

In the case last cited, the court said: "We agree that appellate courts are reluctant to reverse a case upon the ground that a new trial has been improperly granted, upon the theory that the granting of a new trial rests largely in the discretion of the *nisi prius* court, and upon the ground that the erroneous granting of a new trial is likely to be ultimately less injurious than the erroneous refusal of a new trial. But the discretion vested in the *nisi prius* court is a judicial discretion, and will be reviewed when a proper case is presented. The right of appeal from a final judgment granting a new trial is in no manner abridged because of the large discretion reposed in that respect in the *nisi prius* court."

The complaint does not show that any diligence was used by appellees to ascertain the facts, on which they rely for a

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new trial, during the term at which the judgment was rendered. There is no averment that the new evidence was not known by appellees at the time of the trial or during the term. This alone would render the complaint insufficient. *Hines v. Driver* (1885), 100 Ind. 315; *Mercer v. Mercer* (1888), 114 Ind. 558, 17 N. E. 182; *Pepin v. Lautman* (1901), 28 Ind. App. 74, 62 N. E. 60.

It is averred, however, that "the note and mortgage sued on were not in court and not in evidence, the same having been long since paid and canceled." Important as this averment is, standing alone, it is insufficient. If such facts were unknown to appellees at the time of the trial or during the term, or, if known, were not brought to the attention of the court, by reason of the excusable neglect of appellees, or by the fraud of appellant, and these facts, together with the degree of diligence required, were shown by the complaint, a different case would be presented. But the complaint before us is clearly insufficient under the decisions of the Supreme Court and this court, and the demurrer should have been sustained.

The judgment is therefore reversed, with instructions to the court below to sustain appellant's demurrer to the complaint, with leave to amend; costs to follow the final determination of this cause.

NOTE.—Reported in 98 N. E. 74. See, also, under (1) 1913 Cyc. Ann. 3260; (2) 29 Cyc. 963; (3) 2 Cyc. 599; (4) 28 Cyc. 961, 962.

COURT OF HONOR v. RAUSCH.

[No. 7,306. Filed October 3, 1911. Rehearing denied December 5, 1911. Transfer denied April 5, 1912.]

1. INSURANCE.—*Fraternal Insurance.—Change of By-laws.—Effect.*—Where a fraternal society issued a certificate of insurance to one of its members, providing for the payment of a designated and certain sum and providing that the certificate should be incontestable after two years, the society could not, on the death of

the member by suicide more than five years thereafter, avoid its liability for the full amount of the certificate by reason of a by-law, adopted less than two years after the certificate was issued, providing that death by suicide would fix the amount payable on the certificate at five per cent per annum for each year of membership. p. 164.

2. INSURANCE.—*Fraternal Insurance.—Right to Change By-laws.*—Fraternal societies cannot amend their by-laws so as to impair or modify contracts of insurance previously made. p. 164.
3. INSURANCE.—*Fraternal Insurance.—Contract.—Compliance With Future By-laws.—Construction.*—Compliance with future by-laws, as used in an agreement, in the application for membership in a fraternal insurance order, that the applicant will comply with the laws and rules of the order then in force and which may thereafter be adopted, has reference to future by-laws pertaining to the duties of the members, but not affecting the rights granted by virtue of the contract of insurance. p. 165.

From Superior Court of Vanderburgh County; *Alexander Gilchrist*, Judge.

Action by Elizabeth Rausch against the Court of Honor. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Charles L. Wedding, William B. Risse, for appellant.

Charles B. Harris, for appellee.

IBACH, J.—The complaint in the case, in substance, alleges that defendant (appellant herein) is a mutual benefit society, duly organized and engaged in the business of insuring the lives of its members, that on May 8, 1903, George Rausch became a member of the society, and it issued to him a certificate of membership, whereby it promised to pay on his death the sum of \$1,000 to his wife, to whom the certificate was made payable at the date of its issue; that on September 11, 1908, said George Rausch died, and up to the time of his death he had performed all the conditions required of him by the terms of his certificate, and by his contract of insurance, and that plaintiff had also done everything required of her by the terms of such certificate and contract of

insurance. It is also averred that on October 6, 1908, proof of the death of said George Rausch was made, and that the amount of the certificate was due to plaintiff on January 6, 1909.

The demurrer to the complaint being overruled, defendant filed answer, averring that said George Rausch, in his application for membership in defendant order, agreed to conform to the constitution, laws and rules of the order then in force, and which might thereafter be adopted; that he committed suicide on September 11, 1908, which was in violation of the laws of the order, and which violation fixed the amount payable on the certificate at five per cent per annum for each year of membership; that in accordance with such laws the amount due to plaintiff was \$266.67, which amount had been tendered her.

Plaintiff replied to the answer, saying that at the time of the application for membership, and the issuing of the certificate sued on, there was in force a provision among the laws of the order that the certificate should be incontestable after two years, on certain conditions therein set forth, and that such provision was in force until July 1, 1903, when the repeal thereof, which was made on May 27, 1903, became effective. A demurrer to the reply for want of facts was overruled. On the issues thus formed the case was tried, and plaintiff obtained judgment for \$1,000 and interest, less the amount of the tender which had been made and paid into court.

The errors relied on by appellant for reversal are: (1) the overruling of the demurrer to the reply, and (2) overruling the motion for a new trial.

It will be observed that this appeal presents very much the same question determined by this court in the case of *Court of Honor v. Hutchens* (1909), 43 Ind. App. 321, 82 N. E. 89. With the exception of the names of the member and the appellee in that case, the amount of the insurance, the date of

the issue of the certificate, and the date of the member's death, the pleadings are substantially the same as in the case before us.

Appellant's counsel, however, insist that there is a difference in the two cases, in that in the case just cited the insured had held his certificate for more than two years before the incontestable clause was repealed, and in this case the insured had held the certificate less than two years before the incontestable clause was repealed.

It is true that in the case at bar the insured was in
1. possession of his certificate less than two years when appellant repealed the incontestable clause contained therein, but his death did not occur for more than five years after the issue of the certificate to him.

There is no legal difference between the two cases. The terms of the contract made by the parties fix their respective legal rights, and, so far as we are able to discover, the contract entered into between Hutchens and the insurance association is identical with that made by Rausch and the same association, appellant in the present case, and the decision of the Hutchens case is controlling here. We can only emphasize what is determined by the court in that case.

After the expiration of two years the defense of suicide became unavailable, and the contract of insurance contained in the certificate became incontestable for any reasons except those stated in the incontestable clause, which in this case are two: namely, failure to pay assessments and violating the law of the order. The certificate under consideration was issued to the insured more than five years before his death.

It has long been settled, not only by the Hutchens
2. case, but by numerous cases determined by the courts of this State and other states, that amendments to by-laws, which may be adopted by societies such as appellant, cannot in any way change the terms of contracts previously made so as to impair or modify the obligations created in contracts of insurance.

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Compliance with future by-laws has reference to such by-laws as may be adopted at some future time pertaining to the duties of the members, but cannot affect the rights granted such members by virtue of the contract of insurance. We therefore hold that appellant could not repeal the incontestable clause of Rausch's policy, and pass a five per cent per annum by-law, and thereby lessen the liability contained in the policy when issued to decedent at a previous date, and thereby defeat appellee's right to recover the full amount of \$1,000.

Counsel for appellant urge that the decision of the case of *Court of Honor v. Hutchens, supra*, is in conflict with the decision of the Supreme Court in the case of *Supreme Lodge, etc., v. Knight* (1889), 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409. While there are points of similarity in the two cases, the Hutchens case and the case at bar can be readily differentiated from the case of *Supreme Lodge, etc., v. Knight, supra*, by reference to the following words of Judge Elliott on page 498, as well as on other grounds: "It is to be constantly kept in mind that the contract does not bind the society to pay a designated sum absolutely and at all events, but, on the contrary, the contract, by its express terms, limits the beneficiary to a specific fund derived from assessments."

The contracts in the present case and in the Hutchens case bind the society to pay a designated and certain sum, and not a contingent sum.

The judgment is affirmed.

Lairy, C. J., Felt, Adams, Hottel, Myers, JJ., concur.

NOTE.—Reported in 95 N. E. 1018. See, also, under (1) 29 Cyc. 80; (2) 29 Cyc. 72; (3) 29 Cyc. 76. For a discussion of the validity of amendments to the by-laws of fraternal benefit societies as applied to existing members, see 1 Ann. Cas. 717; 10 Ann. Cas. 625. As to how an existing member of a beneficial association is affected by a change made in the by-laws to avoid payment in cases of suicide, see 83 Am. St. 710.

CURRY ET AL. v. PLESSINGER, ADMINISTRATOR.

[No. 7,889. Filed November 3, 1911. Rehearing denied January 24, 1912. Transfer denied April 5, 1912.]

1. **EXECUTORS AND ADMINISTRATORS.—Appointment of Administrator.—Joint Appointment.—Discretion of Court.**—The appointment of a coadministrator lies in the discretion of the court. p. 173.
2. **EXECUTORS AND ADMINISTRATORS.—Refusal of Joint Application.—Appeal.**—Where there was no evidence in the record, no available error was presented by assignments of error based on the court's refusal to grant letters of administration on a joint application therefor and on its refusal to revoke letters previously granted. p. 173.
3. **EXECUTORS AND ADMINISTRATORS.—Appointment of Administrator.—Refusal of Joint Application.—Discretion of Court.**—The sworn petition and application for the removal of an administrator and the granting of letters to the petitioners jointly, are insufficient to show an abuse of discretion by the court in refusing to grant letters on such joint application. p. 173.
4. **EXECUTORS AND ADMINISTRATORS.—Appointment of Administrator.—Procedure.**—The matter of the appointment of an administrator of the estate of a deceased person is not an ordinary proceeding and is not controlled and governed by the ordinary rules of procedure. p. 174.
5. **EXECUTORS AND ADMINISTRATORS.—Appointment of Administrator.—Duty of Court.—Statute.**—Under §2742 Burns 1908, Acts 1901 p. 281, on the filing of a petition and application for the removal of an administrator and the granting of letters to the petitioners jointly, it became the duty of the court to examine the applicants, and such other persons as it deemed necessary, touching their qualification for such appointment. pp. 174, 175.
6. **EXECUTORS AND ADMINISTRATORS.—Appointment of Administrator.—Statute.**—Section 2742 Burns 1908, Acts 1901 p. 281, is mandatory in its requirement that letters of administration shall be granted to the next of kin, where the application is made within the time therein provided. p. 175.
7. **EXECUTORS AND ADMINISTRATORS.—Letters of Administration.—Revocation.**—Where letters of administration have been issued contrary to the provisions of the statute, they may be revoked by the court of its own motion, or on the application of any person interested, or upon the suggestion of an *amicus curiae*. p. 176.
8. **EXECUTORS AND ADMINISTRATORS.—Appointment of Administrator.—Priority of Right.—Contest.—Motion for New Trial.**—Where on the filing of a verified petition and application asking

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the removal of an administrator and the appointment of the petitioners, the court determined the case without hearing any evidence, the overruling of a motion for a new trial was erroneous. p. 176.

9. **APPEAL.—Reserved Question of Law.—Perfecting Appeal Under General Provisions of Practice Act.**—The mere fact of giving notice to the court of an intention to perfect an appeal presenting a reserved question of law under §669 Burns 1908, §630 R. S. 1881, does not prevent appellant from afterwards perfecting the appeal under the general provisions of the practice act. p. 176.
10. **APPEAL.—Review.**—When it appears on appeal that the ends of justice will best be served by granting a new trial, the court will grant a new trial rather than to render judgment in favor of the appellant. p. 177.

From Wells Circuit Court; *Charles E. Sturgis*, Judge.

Petition and application by William A. Curry and Mary S. Wiecking for revocation of letters of administration granted to Charles H. Plessinger on the estate of David Franklin Curry, deceased, and for the granting of such letters to the petitioners. From a judgment against the petitioners, said petitioners appeal. *Reversed.*

Eichhorn & Vaughn, for appellants.

Jacob F. Denny, Abram Simmons and Frank C. Dailey, for appellee.

HOTTEL, J.—This appeal is from a judgment of the court below, rendered in the matter of a petition under oath filed by appellants, asking the revocation of letters of administration issued by the court to appellee, accompanied by a sworn application of appellants to be themselves appointed to administer on the estate involved.

The transcript of the record discloses that on September 20, 1910, appellee filed in the Wells Circuit Court an application for letters of administration on the estate of David F. Curry, deceased. Said application was in the usual and ordinary form under oath, and showed that said decedent died on September 16, 1910, intestate, leaving a personal estate of \$12,000. Said application was accompanied by bond, and said letters were issued and confirmed by the court

on September 20, 1910. On September 21, 1910, appellants filed their joint petition under oath, asking the revocation of said letters, and accompanied the same with their verified application for letters of administration to be issued to them.

Said petition, application, and record entry showing the filing of the same, are set out in the transcript, and we here set out said record entry and said petition.

“In Re Estate of
David Franklin Curry, deceased.

Comes now Charles H. Plessinger, administrator in this behalf, by his attorneys, and come also William A. Curry and Mary S. Wiecking, by their attorneys and file their petition to revoke the letters of administration issued herein to Charles H. Plessinger, which petition is in the words and figures following, to wit:

State of Indiana, ss.
County of Wells,

Wells Circuit Court,
Sept. term, 1910.

Petition by William A. Curry &
Mary S. Wiecking to revoke let-
ters hereto granted.

In Re the estate of
David F. Curry, deceased.

To the Honorable Charles E. Sturgis, Judge of the
Wells Circuit Court:

The undersigned, William A. Curry and Mary S. Wiecking, being each duly sworn, respectfully show to the court that David F. Curry, deceased, departed this life on the 16th day of September, 1910, intestate, as they believe, and leaving a personal estate in Wells county, Indiana, of the probable value of \$10,000.00; that said decedent was at the time of his death a resident of said Wells county, Indiana; that said David F. Curry left no parents, wife or children surviving him; that affiant William A. Curry is the son of a deceased brother of the deceased father of said David F. Curry, and that the affiant, Mary S. Wiecking, is the daughter of deceased brother of said David F. Curry; that both of the affiants are related in the degree of cousin to said decedent; that neither of them has at any time relinquished his right to administer upon the estate of

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said decedent and that each of them is an heir at law of said decedent; that on the 20th day of September, 1910, without any notice to either of these affiants and without their knowledge, one Charles H. Plessinger filed in the office of the clerk of the Wells Circuit Court, and caused to be presented to the Judge of the Wells Circuit Court an application for letters of administration upon the estate of said decedent, and filed therewith his bond in the sum of \$40,000.00, and that thereupon letters of administration were issued to Charles H. Plessinger and said letters so issued were confirmed by the Judge of the Wells circuit court, and that affiants are informed that said Charles H. Plessinger was sworn to faithfully discharge the duties of his trust as such administrator. Affiants further show that said Charles H. Plessinger was not in any manner related to the decedent within any degree, is not an heir of said decedent, is not a legatee and is in no wise interested in the estate of said decedent, but is an entire stranger thereto. Affiants further say and show that they are desirous of taking upon themselves jointly the administration of the estate of said decedent and have prepared and herewith present their application for letters of administration upon said estate together with a good and sufficient bond.

Affiants therefore ask the court to set aside and revoke said letters heretofore granted and issued to said Charles H. Plessinger, and to grant letters of administration to these affiants and to order that the same be issued and to confirm such letters of administration upon the estate of said David F. Curry, deceased, to these affiants.

William A. Curry.

Mary S. Wiecking.

Subscribed and sworn to before me, this 21st day of September, 1910.

W. H. Eichhorn,
Notary Public.

* * * *

The said William A. Curry and Mary S. Wiecking file their application for letters of administration in this behalf, together with the written consent of Ernst Wiecking, husband of said Mary S. Wiecking, to her appointment as such administratrix, and their bond as such administrators, which application, consent and bond are in these words, to wit."

Then follows the application of appellants for letters of administration on said estate, which avers substantially the same facts set out in the above petition, and alleges, in addition, that applicants had no notice or knowledge of appellee's application for said letters, or of his appointment and confirmation prior to September 21, 1910, and asks the court that letters of administration be issued to them *jointly*.

Then follows a copy of the writing signed by Ernest Wiecking, husband of Mary S., consenting to such appointment, and also a bond in the sum of \$20,000, signed by two sureties.

The transcript discloses no demurrer or answer of any kind filed to said petition and application, and no further pleadings or proceedings had in said matter, except the following:

“In Re estate of
David Franklin Curry, deceased.

Comes now Charles H. Plessinger, administrator in this behalf, and come also William A. Curry and Mary S. Wiecking, by counsel, and in person, and the court being fully advised in the premises, overrules the motion of the said William A. Curry and Mary S. Wiecking to revoke the letters of administration issued in this behalf to Charles H. Plessinger, to which ruling the said William A. Curry and Mary S. Wiecking separately except. The application of the said William A. Curry and Mary S. Wiecking for letters of administration of the estate of David Franklin Curry, deceased, is hereby overruled by the court, and such letters of administration are denied, to which ruling the said applicants separately except. It is therefore ordered, adjudged and decreed by the court that the motion of the said William A. Curry and Mary S. Wiecking to revoke the letters of administration issued herein to Charles H. Plessinger be, and the same hereby is, overruled, and that the application for letters of administration of the estate of David Franklin Curry, deceased, filed herein by the said William A. Curry and Mary S. Wiecking be, and the same hereby is refused and the said letters of administration are hereby denied; and that the costs accrued in this behalf occasioned by said motion to revoke letters and said application for letters of administration, be, and the

same hereby are, taxed against the said William A. Curry and Mary S. Wiecking. The said William A. Curry and Mary S. Wiecking now give notice that the action of the court in overruling their motion to revoke letters and in refusing their application for letters of administration of the estate of David Franklin Curry, deceased, is reserved as a question of law, under section 669, Burns' R. S. 1908 [§630 R. S. 1881], and request the court to direct the bill of exceptions to be so made that it will distinctly and briefly present the questions so reserved to the court on appeal."

A motion for a new trial was filed and overruled, and exceptions saved. A bill of exceptions was filed in the case which is set out in the transcript, and contains the record entries, showing the application and appointment of appellee, and the confirmation thereof, and his qualification thereunder, and the petition and application of appellants, and the court's refusal to revoke appellee's letters, and refusal to appoint appellants, and other record entries and the judgment above set out, and contains the following further statement: "That said Charles H. Plessinger, on said 21st day of September, 1910, duly appeared in said court to said application to revoke letters and to said petition and application of said William A. Curry and Mary S. Wiecking, for letters of administration on said estate. That thereupon said application to revoke and the petition of said William A. Curry and Mary S. Wiecking to be appointed administrator of said estate was continued, by agreement of said Charles H. Plessinger and said William A. Curry and Mary S. Wiecking from day to day in said court, until October 7th, 1910, the same being the 29th juridical day of said term of said court. The Wells Circuit Court then and there fixed the 7th day of October, 1910, by agreement of all the parties, the same being the 29th juridical day of said term, for the hearing of said petition to revoke said letters of administration and the petition of William A. Curry and Mary S. Wiecking to be appointed administrator and administratrix of said estate. And be it further remembered, That on the 7th day of

October, 1910, the same being the 29th juridical day of said term, said Charles H. Plessinger, administrator of said estate, duly appeared in the Wells Circuit Court by himself and counsel, Abram Simmons, Frank C. Dailey and Jacob F. Denny and the said William A. Curry and Mary S. Wiecking duly appeared in person and by counsel, Eichhorn & Vaughn, and argument was heard in open court on said petition to revoke letters, *and no evidence of any kind whatever was heard or offered in support of said petition.* And the said Charles H. Plessinger, administrator of said estate, filed no pleading and filed no answer to said petition to revoke said letters nor pleading of any kind in said proceeding to revoke said letters of administration issued to said Charles H. Plessinger.”

This bill of exceptions then shows the ruling of the court made on said petition and application on October 11, 1910, and the judgment thereon substantially as above set out.

The errors assigned are as follows:

(1) The court erred in overruling appellants’ petition to revoke the letters of administration issued to Charles H. Plessinger as administrator of the estate of David F. Curry.

(2) The court erred in overruling appellants’ petition for letters of administration on the estate of David F. Curry, deceased.

(3) The court erred in refusing to revoke the letters issued to Charles H. Plessinger, administrator of the estate of David F. Curry, deceased.

(4) The court erred in refusing to grant letters of administration on the estate of David F. Curry, deceased, to William A. Curry and Mary S. Wiecking.

(5) The court erred in overruling appellants’ motion for a new trial.

It is earnestly insisted by appellee that the questions presented by the assigned errors cannot be considered by this court, because the special bill of exceptions saving the questions so relied on as errors expressly shows that appellants

introduced no evidence on their said petition and application.

We are unable to find in any previous decision of this court or the Supreme Court a case where the question has been presented in the manner it is here presented. We are inclined to agree with the position taken by appellee, to the extent of holding that inasmuch as there is no evidence in the record, this court has nothing on which to predicate an opinion on the question of whether the court below erred in refusing to revoke appellee's letters, or in refusing to grant letters to appellants. Even if it should be conceded, as appellants contend, that their sworn petition and application, in the absence of any answer to the same, should be taken as confessed, a question which we deem unnecessary to decide, in view of the conclusion we have reached in the case, appellants would not be greatly helped by such concession.

Appellants' petition and application are joint. Their assignment of error is joint. The questions presented by the first, second, third and fourth errors assigned therefore challenge the ruling of the court in refusing to revoke the letters issued to appellee, and appoint said applicants *jointly* to administer on said estate.

In the case of *Shrum v. Naugle* (1899), 22 Ind.

1. App. 98, 100, 53 N. E. 243, this court expressly held that whether or not a coadministrator should be appointed, is discretionary with the court.

See, also, *Wallis v. Cooper* (1890), 123 Ind. 40, 23

2. N. E. 977. In the absence of evidence showing an abuse of such discretion, this court could not say any error was committed by the court's refusing such appointment. The sworn petition and application, if taken as true, make no such showing. There being no evidence in the

3. record, we are of the opinion that no available error is presented by assignments one, two, three and four, *supra*.

The fifth error assigned calls in question the ruling of the

court on appellants' motion for a new trial. This ruling of the court presents a more serious question. The first ground of this motion is: "The decision of the court is not sustained by sufficient evidence."

Appellee's position as to the effect of the showing made by the bill of exceptions, that *no evidence was offered or heard in the case, ceases to avail him anything when applied to the question now involved*. In fact, in view of the express holdings of this court and the Supreme Court, appellee's argument that there is no evidence before this court from which it can determine whether appellee's appointment should be revoked and appellants appointed is equally applicable to the action of the lower court. By the express showing of the lower court, it heard no evidence and had none before it by which it could determine the same question. If this were the ordinary case it might be said that this was appellants' fault, and that they cannot take advantage of their own neglect to offer such evidence. But this is not an ordinary pro-

4. ceeding, and is not controlled and governed by the ordinary rules of procedure. *Cooper v. Cooper* (1909), 43 Ind. App. 620-623, 88 N. E. 341; *Toledo, etc., R. Co. v. Reeves* (1894), 8 Ind. App. 667, 35 N. E. 199.

The matter of the appointment of an administrator of the estate of a deceased person is controlled by statute.

Section 2742 Burns 1908, Acts 1901 p. 281, provides: "At any time after the death of an intestate the proper clerk or court *having examined the person applying for let-*
5. *ters, and such persons as may be deemed proper to be examined, under oath, * * ** whether he left a will and *concerning the qualifications of such persons, and there being no such will, shall grant letters of administration in their order. First: To the widow or widower. Second: To the next of kin. Third: To the largest creditor applying and residing in the state.*" (Our italics.)

Under this statute, and the express holdings of this court

and the Supreme Court construing the same, the filing by appellants of their said petition and application imposed on the court the duty of examining the applicants and such other persons as it deemed necessary touching the qualifications of applicants, etc.

This petition and application show that decedent died September 16, 1910, and that appellee was appointed September 20, 1910; that appellants filed their application September 21, 1910; that appellee was a stranger to decedent, neither next of kin nor a creditor, and that appellants are cousins of decedent and heirs of said estate. It has

6. been held by our Supreme Court that the above section "*commands, not directs merely*, that letters shall be granted to the next of kin," where the application is made within the time provided by statute. (Our italics.) *Hayes v. Hayes* (1881), 75 Ind. 395; *Cooper v. Cooper, supra*; *Andis v. Lowe* (1894), 8 Ind. App. 687, 690, 34 N. E. 850; *Shrum v. Naugle, supra*; *Jones v. Bittinger* (1887), 110 Ind. 476, 11 N. E. 456.

This court in the case of *Cooper v. Cooper, supra*, at p. 623, said: "The point is made by appellee that the appellant's written application for letters fails to show his

5. qualification and competency, and that to entitle him to letters these should appear. The statute upon the subject does not prescribe any precise form in which the application shall be made, and does not even require that the application shall be in writing. *It does require that the court shall examine, under oath, the person applying, touching the time and place of the death of the intestate, whether he left a will, and concerning the qualifications of the applicant. We think that the application filed by the appellant was sufficient to call upon the court to entertain the application and examine the appellant as to his qualifications.*" (Our italics.)

In the case of *Croxton v. Renner* (1885), 103 Ind. 223, 2

N. E. 601, the Supreme Court said: “Whenever the court has issued letters of administration, which are not
7. authorized by, but directly contravene, the express provisions of the statute, such court may, of its own motion, or upon the application of any person interested, or upon the suggestion of an *amicus curiae* revoke, annul or set aside the letters so issued.”

Under these authorities, the verified petition and application filed in this case were enough to put upon the court the necessity of examining appellants or hearing some evidence on which to predicate its judgment in said case,
8. and, having determined the case without hearing any evidence, the court should have sustained appellants’ motion for a new trial.

On account of the error of the lower court in overruling said motion, the judgment of said court is reversed, with instructions to such court to grant a new trial, and for further proceedings not inconsistent with this opinion.

ON PETITION FOR REHEARING.

HOTTEL, J.—Appellee urges that a rehearing should be granted in this case, and as grounds therefor insists (1) that the appeal was taken under §669 Burns 1908, §630 R. S. 1881, presenting a reserved question of law, and that under such an appeal a consideration of the evidence is not proper; (2) that the appellant waived the point on which the decision was reversed; (3) that the opinion is wrong even on the merits of the question presented by the appeal.

On the first ground of the petition, it is sufficient to say, that while it is true that the record discloses that appellants first notified the court that they would appeal on a reserved question of law under §669, *supra*, the record
9. further discloses that after such notice and the filing of the bond perfecting such appeal, and within the time allowed by the statute, appellants filed their motion for new

trial of said case which was by the court overruled and an appeal prayed, and time was again given in which to file bond, and the second bond was filed and appeal perfected thereunder.

The mere fact that appellants had notified the court of their intention to perfect an appeal, presenting a reserved question of law, did not prevent them from afterwards perfecting their appeal under the general provisions of the practice act, which they did in this case. This is expressly decided by this court in the case of *McKendry v. Sinker, Davis & Co.* (1891), 1 Ind. App. 263, 27 N. E. 506.

In answer to the second ground of this petition we submit that one of the errors relied on for reversal by appellants was that "the court erred in overruling appellants' motion for a new trial." Under their points and authorities, appellants cited the section of the statute which provides for an appointment of an administrator, and which imposes on the court the duty of examining the applicant for letters. Appellee in his brief also presented the question to the court as follows: "The transcript, page 21, lines 26 to 28 and page 22, lines 17 to 21, shows that no evidence of any kind whatever was heard or offered or introduced either in support of the petition to revoke letters, or the petition for letters." Thus it will be seen that if appellants had in no manner presented the question, appellee in his brief presented the matter to this court in such a way that the court was bound to know that the lower court had acted on appellants' petition in violation of the terms of the statute, *supra*, which required it to examine the applicant under oath. Under such circum-

stances, it was apparent that the ends of justice would

10. best be served by granting a new trial, and when such fact appears, it is the duty, and has always been the rule of the court, to grant a new trial, rather than to render judgment in favor of the appealing party.

We see no reason for changing the original opinion on the

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merits of the question presented. We think the conclusion reached is amply supported by the authorities therein cited.

Petition for rehearing overruled.

NOTE.—Reported in 96 N. E. 190, 97 N. E. 124. See, also, under (1, 3) 18 Cyc. 114; (2) 3 Cyc. 164; (4, 5) 18 Cyc. 124; (6) 18 Cyc. 86; (7) 18 Cyc. 151; (8) 18 Cyc. 124, 168; (10) 3 Cyc. 455. As to the grounds effective for the removal of an executor or administrator, see 138 Am. St. 525.

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COUNTY, v. SCHOOL CITY OF
JEFFERSONVILLE.

[No. 7,873. Filed November 28, 1911. Rehearing denied February 23, 1912. Transfer denied April 5, 1912.]

1. APPEAL.—*Briefs.—Must Set Out Errors Relied on.*—Errors assigned and argued, but not set out in appellant's brief, are considered waived. p. 181.
2. SCHOOLS AND SCHOOL DISTRICTS.—*Transfer of Pupils.—Action for Tuition.—Recovery of Penalty.*—Under the provisions of the act of March 6, 1909 (Acts 1909 p. 331), in an action by one school corporation against another to recover tuition due on account of the transfer of pupils, where the evidence warrants a finding that tuition was due in the sum claimed and that there was a failure to pay same as provided in said act, the court must add a penalty of ten per cent to the amount found due. p. 181.
3. SCHOOLS AND SCHOOL DISTRICTS.—*Transfer of Pupils.—Action for Tuition.—Motion for New Trial.—Excessive Recovery.—Appeal.*—In an action brought under the act of March 6, 1909 (Acts 1909 p. 331), to recover tuition due on account of the transfer of pupils, alleged error in overruling a motion for a new trial because the recovery is too large is unavailing on appeal against a judgment for plaintiff for the amount of the tuition and the statutory penalty of ten per cent, where there was evidence to warrant the court in finding that the tuition claimed was due and had not been paid as required by said act. p. 182.
4. APPEAL.—*Briefs.—Statement of Evidence.—Sufficiency.*—Where appellant set out in his brief certain questions and answers from the testimony of two witnesses, and a statement of what he deemed to be the substance of the testimony of other witnesses, including conclusions and argumentative statements, and omitted the names of many witnesses, there was no such compliance with the rule, requiring appellant's brief to contain a condensed recital

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of the evidence in narrative form, as to raise any question upon the sufficiency of the evidence to sustain the decision of the court. p. 182.

5. **NEW TRIAL.—Motion.—Matters Properly Included.**—“*Decision Contrary to Law.*”—As a general rule matters properly included in a motion for a new trial must relate to errors of law occurring at the trial, and an assignment in a motion for a new trial that “the decision is contrary to law” does not perform the office of an exception to conclusions of law stated upon a special finding of facts. p. 183.

6. **APPEAL.—Review.—Merits Fairly Tried.**—A cause will not be reversed where it appears that its merits have been fairly tried and determined in the lower court. p. 183.

From Clark Circuit Court; *Harry C. Montgomery*, Judge.

Action by the School City of Jeffersonville against Jeffersonville School Township, Clark County. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Laurent A. Douglass, for appellant.

George H. Voigt, for appellee.

ADAMS, J.—At the beginning of the school year of 1908, the School City of Jeffersonville admitted into its public schools 124 children of school age, residing in Jeffersonville township, outside of the city limits, some of whom were admitted to the high school and others to the grade schools. Certificates of transfer for 88 of the 124 children admitted were issued by the township trustee, and certificates of transfer for 36 were issued by the county superintendent. After the close of the school year in May, 1909, appellee made out and presented to the trustee of appellant statements, as required by law, showing a claim against appellant for tuition in the sum of \$1,613.42. Demand for payment was made on the trustee and refused, and this action was brought to collect the amount shown to be due by the statements, together with the statutory penalty of ten per cent. On request the court made a special finding of facts and stated conclusions of law thereon, favorable to appellee.

The court found, in brief, that in the year 1908-9 there resided within Jeffersonville township a number of children

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who could better be accommodated in the schools of the city of Jeffersonville during the school year, beginning in September, 1908, and ending in May, 1909; that the parents and guardians of said children, prior to and during said school year, requested the trustee of the township for orders of transfer, which would entitle such children to attend the schools of appellee, under conditions prescribed by law; that the trustee granted transfers to certain of said children, and denied transfers to others; that such denials were not reduced to writing; that after the denial of such transfers, the parents and guardians of such children, for whom transfers were denied during the months of August and September, 1908, appealed their respective applications to the county superintendent of schools of Clark county; that the superintendent thereupon, and prior to the time said children were received in the schools of appellee, granted and made orders of transfer for said school year to all children for whom transfers were denied by the township trustee; that on or about December 5, 1908, the county superintendent reduced said transfers to writing, and the same were then delivered to the city schools corporation; that on November 12, 1909, the school trustee of appellee filed with the township trustee a complete statement, showing all the transfers given, the name of each child, the school corporation from which said child was received, together with a statement of the attendance of each, and the amounts due appellee by reason thereof; also a certified statement of the annual per capita cost of maintaining the schools which said transferred children attended during the year; that all the facts set forth in said statement were true, and it appears from the same that the school township was indebted to the school city, on account of tuition for the children so transferred, in the sum of \$1,613.42; that on November 12, 1909, demand for payment was made on the trustee of the school township for the sum due, and payment thereof was then and there refused.

Other findings of the court show the number of children

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transferred to the grade schools and the number transferred to the high school, together with the per capita cost of maintaining each school during the year.

It is found that there is due and unpaid from appellant to appellee the sum of \$1,613.42, together with the statutory penalty of ten per cent—in all \$1,774.76.

The court stated as its conclusions of law that appellant is indebted to appellee in the sum of \$1,774.76, and that appellee is entitled to recover said amount from appellant, together with costs. Motion for a new trial was overruled, and judgment rendered on the conclusions of law. Motion to modify the judgment, by reducing the same in the amount of the penalty added, was overruled.

Under head of “Errors Relied upon for Reversal”, appellant’s brief designates, (1) the overruling of the motion to modify the judgment; (2) the overruling of appellant’s motion for a new trial. Other errors are assigned and argued, but such errors must be considered waived. It was said in *King v. State, ex rel.* (1911), 47 Ind. App. 595, 93 N. E. 1082: “No rule is more important than the one which requires appellant to set out in his brief the errors upon which he relies for reversal. This is the first matter upon which the court on appeal wishes to be advised, and an appellant’s brief is the court’s only source of information.” Our decision, therefore, will be limited to errors designated as relied on for reversal.

The first error calls in question the action of the court in adding ten per cent to the amount found due, as a penalty.

It is provided by the act approved March 6, 1909

2. (Acts 1909 p. 331), amending §6454 Burns 1908, that the trustee of the school corporation from which children are transferred shall pay to the trustee of the school corporation to which such transfers are made, on or before August 1, following the receipt of the statement showing the amount of tuition due, and in the event of failure to pay said tuition when due, a penalty of ten per cent shall attach from

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and after the first day of August of the year in which such tuition is due. If the court, under the evidence, was warranted in finding that there was tuition due from appellant to appellee in the sum claimed, and that appellant had failed to pay the same as provided in the above act, then it was the duty of the court to add a penalty of ten per cent to the amount found due.

The other error relied on for reversal is the overruling of appellant's motion for a new trial. This motion is based on the grounds that the decision of the court is not sustained by sufficient evidence, that the decision of the court is contrary to law, and that the amount of the recovery is too

3. large. The cause for a new trial, that the recovery is too large, presents the same question raised by the first error, and is unavailing for the same reason.

Where the insufficiency of the evidence to sustain the decision of the court is relied on as cause for a new trial, the rules of this court require that appellant's brief shall

4. set out a condensed recital of the evidence in narrative form, so as to present the substance clearly and concisely. The evidence set out in appellant's brief relates largely to a controversy in regard to the abandonment of a certain school in Jeffersonville township, with which this appeal is not concerned. The evidence was not set out in narrative form, but by certain questions and answers selected from the testimony of two witnesses. The testimony of other witnesses is not given in narrative form, but is a statement of what counsel deem to be the substance, referring to line and page of the record where the evidence appears. Included in the evidence are many statements which are clearly the conclusions of counsel, and other statements that cannot be considered in any other light than as argument on the evidence. The evidence given at the trial covers almost two hundred pages of the record, and many witnesses shown to have testified in the case are not named as witnesses in appellant's brief. This is not such a compliance with the rule as

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to raise any question on the sufficiency of the evidence. *Dillon v. State* (1911), 48 Ind. App. 495, 96 N. E. 171; *Bradley v. Harter*, 48 Ind. App. 541, 93 N. E. 1081.

The motion also assigns as ground for a new trial, that the decision is contrary to law. It is a general rule that matters properly included in a motion for a new trial must

5. relate to errors of law occurring at the trial. It has been held that this assignment does not perform the office of an exception to conclusions of law stated on a special finding of facts. *Weaver v. Apple* (1897), 147 Ind. 304, 306, 46 N. E. 642; *Bundy v. McClarnon* (1889), 118 Ind. 165, 166, 20 N. E. 718. It has also been held that “the verdict is contrary to law” raises such errors occurring on the trial as have been carried into the verdict. *Berkey v. Rensberger* (1912), 49 Ind. App. 226, 96 N. E. 32. There was no error in overruling the motion for a new trial.

Moreover, the record in this appeal, we think, presents a case within the statutory mandate, that no judgment shall be stayed or reversed, in whole or in part, where it shall

6. appear to the court that the merits of the cause have been fairly tried and determined in the court below.

There is no insistence on the part of appellant that 124 children residing in the township were not given instruction in the schools of the city, or that the amount due, as shown by the statements rendered, was not correct. Appellant was represented in the trial court by able counsel, and there was not only a fair trial, but, we think, a just conclusion was reached.

The judgment is affirmed.

NOTE.—Reported in 96 N. E. 662. See, also, under (1) 2 Cyc. 1014; (4) 1913 Cyc. Ann. 222; (5) 29 Cyc. 957; (6) 3 Cyc. 443.

VANDALIA RAILROAD COMPANY v. BAKER, GUARDIAN.

[No. 7,797. Filed January 10, 1912. Rehearing denied March 15, 1912. Transfer denied April 5, 1912.]

1. **TRIAL.—Instructions.—Railroads.—Street Crossings.—Care Required.**—In an action against a railroad company for personal injuries received at a street crossing, an instruction that it was the duty of defendant to give timely warning of the approach of the train to the crossing, whether or not there was a statute or ordinance requiring it to do so, and that any failure to exercise such care, if shown to exist, was negligence on the part of defendant, was not erroneous where there was another instruction which informed the jury as to the statutory duty of the defendant to give warnings at crossings. p. 187.
2. **APPEAL.—Review.—Instructions.—Harmless Error.**—A cause will not be reversed because of an erroneous instruction, if, in view of the evidence, the error was harmless. p. 187.
3. **TRIAL.—Instructions.—Refusal.—Covered by Other Instructions.**—The refusal of a requested instruction is not erroneous where its subject matter is covered by other instructions given. p. 187.
4. **TRIAL.—Instruction.—Comparing Evidence.—Refusal.**—An instruction, in an action to recover for injuries received at a railroad crossing, which told the jury that it was its duty to reconcile any conflict or apparent conflict in the testimony, and that in doing so it could consider that a person may hear the sound of a whistle or a bell, and not be conscious of hearing such sound, was properly refused as invading the province of the jury. p. 188.
5. **TRIAL.—Duty of Court and Jury.**—It is the duty of the judge to instruct the jury as to matters of law, and of the jury to decide the facts of the case. p. 188.
6. **TRIAL.—Instructions.—Positive and Negative Evidence.—Weight.**—The jury may not be told that positive evidence is to be given more weight than negative evidence. p. 189.
7. **EVIDENCE.—Positive Evidence.**—Where witnesses, who were looking at a train as it approached a crossing and had their attention directed to it, testified that no warning of its approach to the crossing was sounded, the evidence was positive evidence. p. 189.
8. **APPEAL.—Depositions.—Motion to Strike Out.—Record.—Bill of Exceptions.**—A motion to strike out the answers to certain questions in a deposition, not made in the manner required by §662 Burns 1908, Acts 1903 p. 338, does not become a part of the record under the provisions of §663 Burns 1908, Acts 1903 p. 338,

and, unless brought in by a bill of exceptions, no question as to the court's ruling thereon can be presented. p. 189.

9. **RAILROADS.—Crossing Accident.—Negligence.—Contributory Negligence.—Evidence.**—In an action to recover for injuries received in a crossing accident, where the evidence showed that a freight-train was standing on a track near the crossing with its headlight burning and thrown toward the crossing, that its engine was emitting steam and otherwise making noise, that the train which caused the injury approached the crossing at a rate of forty miles per hour and without sounding a whistle or gong, that the injured party stopped his team about fifty feet from the crossing and looked and listened, and neither seeing nor hearing an approaching train, proceeded slowly toward the crossing and in so doing continued to look and listen, that between the crossing and the point where the injured party stopped there were places where the headlight of an approaching train might have been seen some distance and at other places it could not have been seen because of freight-cars and other obstructions, that the freight-train attracted his attention somewhat and that he did not see the approaching train until too late to avoid the injury, such evidence was sufficient to warrant the jury in finding that the defendant was negligent in the operation of its train at the crossing and that the injured party was free from contributory negligence. p. 190.

10. **APPEAL.—Review.—Verdict.**—Where there is some evidence to support the verdict, it will not be disturbed on appeal. p. 192.

From Morgan Circuit Court; *Joseph W. Williams*, Judge.

Action by John C. Baker, as Guardian of Marion S. Payton, against the Vandalia Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Samuel O. Pickens and *Owen Pickens*, for appellant.

Will H. Pigg and *John E. Sedwick*, for appellee.

IBACH, P. J.—Appellee recovered judgment for damages for personal injuries received by his ward while crossing appellant's railroad on a street in the town of Paragon, Morgan county, Indiana. The complaint charged negligence of appellant in permitting lumber to be stacked on its right of way and box-cars to stand on the siding in such a manner as to obstruct the view of the track near the crossing, and in running a train at a rapid and reckless rate of speed, omit-

ting to give any signal or notice of its approach to the crossing.

The errors relied on for reversal arise out of the overruling of appellant's motion for new trial.

It is contended that instructions two and three, following, given at appellee's request, are erroneous.

“(2) While I have instructed you as to the duty and care of said Payton in approaching the crossing on Main street where he was injured, it was the duty of said defendant to give timely warning of the approach of its locomotive and train of cars on said track to the plaintiff while approaching said street crossing, and this defendant was bound to do, whether or not there was a statute or ordinance requiring signals to be given at said street crossing, and any failure to exercise this care required on the part of said defendant at said street crossing, if shown to exist in this case, was negligence on the part of said defendant.”

“(3) In this case, the degree of care required of said defendant while approaching the street crossing where plaintiff was injured, was commensurate with the known dangers of the particular situation created by its use of said street. The defendant had a right to occupy said streets with its tracks and to use them for the purpose of moving its locomotives, cars and trains over and along said tracks crossing said street; but it had no exclusive right, except to run its locomotives, cars and trains on its said track over said street crossing, and the law imposes upon the defendant the duty of using and managing its locomotives and trains of cars on and over its line of road crossing said street in such a manner as not to injure others who were themselves lawfully using said street and said street crossing; and the running of its locomotives and trains of cars at a high rate of speed over said street crossing without giving reasonable notice and warning of the approach of its locomotives and cars by ringing a bell or sounding a whistle would subject said defendant to liability to the plaintiff, if said Payton was injured while cross-

ing said street, and without any fault or contributory negligence upon his part.”

Instruction two is identical with an instruction approved by this court in the case of *Pittsburgh, etc., R. Co. v.*

Lynch (1909), 43 Ind. App. 177, 179, 87 N. E. 40. In

1. the present case, as in that case, another instruction informed the jury as to the statutory duty of the railroad company to give warnings at crossings. Instruction three embodies the language of the instruction approved on pages 180 and 181 of the opinion in the *Lynch* case.

2. The reasoning in that case is based mainly on the case of *Cleveland, etc., R. Co. v. Miles* (1904), 162 Ind. 646, 70 N. E. 985. We are convinced that the opinion in the *Lynch* case states the law correctly, and is well grounded on precedent, and we see no reason to alter the position there taken. The instruction in this case, however, is erroneous at least in omitting the essential element of the failure of duty causing the injury, which appears in the two cases cited, but in view of the evidence was harmless.

Error is assigned in failing to give at appellant's request instruction nineteen, following: “In determining whether the whistle was sounded or the bell was rung for the crossing, you should consider all the evidence bearing upon the question; the testimony of witnesses who say they did not hear the whistle or the bell, as well as the testimony of the witnesses who say they did hear the whistle or the bell, and you are the exclusive judges of the weight you will give such testimony. It is your duty to reconcile any conflict or apparent conflict in such testimony, if you can do so, and in doing so you may consider that a person may hear the sound of a whistle or a bell, and not be conscious of hearing such sound.”

This instruction, in so far as it applies to the duty of the jury to reconcile conflicting evidence, is included in

3. the court's able and complete instruction twenty-nine, as follows: “In this case you accept the law as

given you by the court, but you are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to their testimony. If there is real or apparent conflict in the evidence, it is your duty to reconcile that conflict so that all may stand if it can be done, then it is your province to determine what you will accept as true and what you will reject as false. In determining what weight you will give to the testimony of a witness, you may consider all his evidence, whether it is reasonable or unreasonable, sustained or unsustained, whether it is corroborated by other credible evidence, the knowledge which the witness has of the facts about which he testifies, the intelligence of the witness, whether or not the witness has been impeached, his opportunity for knowing or recollecting the facts about which he testifies, his manner upon the stand, any bias or prejudice he may have exhibited toward or against plaintiff or defendant, his interest, if any, in the suit, and any and all other facts and circumstances in evidence, which in your minds go to increase or diminish the weight of such evidence.”

In so far as instruction nineteen told the jury how to compare conflicting evidence, it was erroneous, and rightly refused as invading its province. *Wood v. Deutchman*

4. (1881), 75 Ind. 148. It is the duty of the judge to instruct the jury as to matters of law, its duty to decide the facts of the case. By the last clause of the instruction requested, the jury would have been instructed, not on a matter of law, but on a matter of fact of general knowledge, and the judge would clearly have been out of his province,

5. and would have invaded that of the jury. The last clause of this instruction “does not contain a single proposition of law, but only declarations of supposed facts, which common experience has perhaps established as true. The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench, nor yet are they matters of proof to be

shown as other facts in the case. They may well enter into the arguments of attorneys, one side claiming that experience teaches one thing, and the other side asserting another conclusion, but the jury, not the judge, is the arbiter of such contentions, as of all questions of fact." *Garfield v. State* (1881), 74 Ind. 60. See, also, *Finch v. Bergins* (1883), 89 Ind. 360; *Lewis v. Christie* (1885), 99 Ind. 377; *Indianapolis St. R. Co. v. Taylor* (1905), 164 Ind. 155, 72 N. E. 1045; *Muncie Pulp Co. v. Keesling* (1906), 166 Ind. 479, 76 N. E. 1002.

Counsel for appellant have cited some cases from other states in which the judge has been permitted to instruct the jury as to the comparative weight of positive and neg-

6. ative evidence, but in Indiana the jury may not be told that positive evidence is to be given more weight than negative evidence. *Ohio, etc., R. Co. v. Buck* (1892), 130 Ind. 300, 30 N. E. 19. In the case at bar the testimony of appellee's witnesses, that the whistle was not blown

7. for the crossing and the gong was not sounded, is not all negative evidence for some of these witnesses were looking at the train and had their attention directed to it, and one, at least, was listening particularly to hear the crossing whistle, for reasons connected with the business. Such evidence is positive evidence. *New York, etc., R. Co. v. Robins* (1906), 38 Ind. App. 172, 76 N. E. 804.

Appellant contends that the court erred in overruling its motion to strike out the answers to certain questions in the deposition of witness Joseph Steirwalt. Though ap-

8. pellant's motion appears in the record, it is not in the bill of exceptions, and appellee cites *Smith v. Kyler* (1881), 74 Ind. 575, 579, to the effect that a motion to suppress depositions or parts thereof is no part of the record unless made so by bill of exceptions. Appellant claims that under §3 of an act of April 23, 1903 (Acts 1903 p. 338, §663 Burns 1908) which was passed after the decision in the

Kyler case, and which provides that certain motions shall be a part of the record without being incorporated in a bill of exceptions, its motion is properly in the record.

Section 2 of the act of 1903, *supra* (§662 Burns 1908), provides "that every motion to insert new matter or to strike out any part or parts of any pleading, deposition, report or other paper in the cause shall be made in writing and shall set forth the words sought to be inserted or stricken out." It has been held by the Supreme Court in *Crystal Ice Co. v. Morris* (1903), 160 Ind. 651, 67 N. E. 502, and by this court in *Lindley v. Kemp* (1906), 38 Ind. App. 355, 76 N. E. 798, that this statute is mandatory, and is to be interpreted literally according to its terms, which are that such motions must be in writing, and must set forth the words sought to be inserted or stricken out, and that it is not sufficient to indicate these words by showing in what lines and pages of a pleading or other paper they may be found. Under this section the motions made by appellant to strike out the answers to certain questions in the deposition of Joseph Steirwalt are fatally defective, because they do not set forth the words sought to be stricken out, and because it appears that they were made orally, for there is no record of their being filed as written motions. Had written motions setting forth the words sought to be stricken out, in compliance with §662, *supra*, been filed in the cause, they would have been properly in the record without being included in a bill of exceptions, under §663, *supra*, but since appellant's motions were not made in the manner prescribed, error cannot be predicated of the court's ruling thereon. But we may add, that having considered the evidence sought to be stricken out, in our opinion, it was properly admitted.

It is also contended that the evidence does not support the verdict. The evidence discloses that at the place of the acci-

- dent the railroad runs in a northeast and southwest
9. course, on a straight line for some distance south-
west of the crossing, and making an angle of sixty-

seven degrees with the north and south street on which Payton was traveling. Payton when struck was driving north along this street in a farm wagon drawn by two horses, and the train which struck him was coming from the southwest. At this crossing there were three tracks—a main track, passing track, and sidetrack. The train which struck Payton was running on the main track, the one farthest to the northwest. At the time of the accident a westbound freight-train was standing on the middle track, with the headlight burning and thrown toward the crossing, and its engine was emitting steam and otherwise making a noise. There is evidence to the effect that appellant's train was moving at the rate of forty miles per hour when it passed the crossing, and that no whistle was sounded or gong rung for the crossing. One of the heavy horses attached to the wagon was carried by the train from 150 to 200 feet from the crossing, and the other from 40 to 60 feet. The witness who was in company with Payton at the time of the accident testified, and this is not contradicted, that when about fifty feet from the crossing the team was stopped, and they both looked and listened for an approaching train. At that time no train was in sight, and none could be heard. From that point they proceeded in a walk toward the crossing, and both continued to look and listen, but did not see nor hear any indication of an approaching train. Between the point where they first stopped and the crossing it appears that there were some places where the headlight of an approaching train might have been seen some distance down the track, and at other places it could not have been seen on account of the presence of box-cars on the siding, piles of lumber, ties, tomato crates and other obstructions. The freight-train to the east attracted their attention somewhat; they looked both ways, but did not see the train which struck them until on the track, too late to avoid collision.

We shall not review the evidence further. The finding of the jury, by its verdict that defendant was negligent in the

operation of its train at the public crossing where the injury took place, is amply supported by the evidence of many witnesses. As to whether there was contributory negligence on the part of Payton, the evidence is not so clear. However, it does not necessarily follow that because at some points, while traveling the distance from the place where Payton stopped to the track where he was struck, the train may have been in the view of a person looking for it, that it was actually seen by him, or that he is chargeable with having seen it, there being nothing in the record to indicate that when he was passing any of such open places the train was in the range of his vision. There were other points, as appears from the evidence, at which it could not have been seen on account of numerous obstructions. And because the questions of fact in this case may be surrounded with some doubt, will not justify this court in disturbing the verdict of the jury. It must be conceded that men might differ as to whether or not Payton was guilty of some negligence contributing to his injury, but a jury of twelve intelligent men, after having heard all the evidence in the case, and after having been instructed fully, and with more than ordinary care and clearness on the subject of contributory negligence, has said by its verdict that he did not by his conduct con-

tribute to his injury which he was shown to have received. The determination of these questions controls this court where there is some evidence on which such verdict could properly be based, and the present record contains sufficient evidence authorizing the conclusion.

Judgment affirmed.

NOTE.—Reported in 97 N. E. 16. See, also, under (1) 33 Cyc. 1137; (2) 38 Cyc. 1809; (3) 38 Cyc. 1711; (4) 38 Cyc. 1646; (5) 38 Cyc. 1594; (6) 38 Cyc. 1739; (7) 17 Cyc. 801; (8) 2 Cyc. 1061, 1066; (9) 33 Cyc. 1087, 1093; (10) 3 Cyc. 348. As to the duty of a railroad company to persons crossing in front of its moving train, see 20 Am. St. 114. For a discussion of the weight of positive and negative testimony as to locomotive and street car signals, see 12 Ann. Cas. 1033. On the power of municipal corporations to regu-

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late speed of, and signals from, trains at highway crossings, see 17 L. R. A. (N. S.) 561. As to the duty to give crossing signals for the benefit of persons near a crossing, but who are not about to use the same, see 14 L. R. A. (N. S.) 998; 31 L. R. A. (N. S.) 667.

WILLS ET AL. v. MOONEY-MUELLER DRUG COMPANY.

[No. 7,511. Filed February 14, 1912. Rehearing denied April 16, 1912.]

1. ACCOUNT.—*Action.—Monthly Statement of Account.*—A monthly statement of account, showing charges, credits and the balance due, is sufficient to constitute an account within the meaning of §368 Burns 1908, §362 R. S. 1881. p. 196.
2. ACCOUNT.—*Action.—Complaint.—Indefinite Exhibit.*—Where the statement of an account, filed as an exhibit to a complaint, is not clear, defendant's remedy is by motion to require the same to be made more specific. p. 196.
3. FRAUD.—*Presumptions.*—Under §7483 Burns 1908, §4924 R. S. 1881, fraud will not be presumed nor inferred, but is a question of fact that must be proved as other questions of fact, and, when, averred, must be proved and found. p. 199.
4. TRIAL.—*Conclusions of Law.—Exception.—Admission of Facts.—Limitation of Rule.*—The rule that, for the purposes of the exception, an exception to a conclusion of law admits that the facts have been fully and correctly found, is limited to the facts found within the issues formed by the pleadings. p. 199.
5. TRIAL.—*Trial by Court.—Findings Not in Conformity to Issues.*—In so far as the same affected the transferee, a special finding of fact that a debtor, for the purpose of defrauding creditors, sold and transferred a stock of goods for the sum of \$800, that the transferee at the time knew that the sale was made for the purpose of defrauding creditors and that he then and thereby aided such debtor in defrauding his creditors, was not within the issues tendered by a complaint that proceeded on the theory that there was no actual sale, but that it was simply a sham or pretended sale wherein the debtor retained title and ownership of the goods, so that conclusions of law based thereon were erroneous. p. 199.
6. FRAUD.—*Fraudulent Sales.—Consideration.—Relief to Creditors.—Findings.*—Where relief is granted to creditors affected by a fraudulent sale, even in a case where the consideration repre-

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sents full value, the finding must be within the issues tendered by the complaint. p. 200.

From Marion Circuit Court (17,205); *Charles Remster*, Judge.

Action by the Mooney-Mueller Drug Company against John B. Wills and others. From a judgment for plaintiff, the defendants John B. Wills and Leslie A. Wills appeal. *Affirmed* as to John B. Wills and *reversed* as to Leslie A. Wills.

A. R. Fecmster and *Morgan & Morgan*, for appellants.

Thomas D. McGee, *Edward D. Reardon* and *James H. Drew*, for appellee.

ADAMS, J.—Appellee, a corporation, brought this action against John B. Wills, Leslie A. Wills and Flora E. Wills. Leslie A. Wills is the son of John B. Wills, and Flora E. Wills, who does not join in this appeal, is the divorced wife of John B. Wills.

The action was on an account for goods and merchandise sold to John B. Wills and Flora E. Wills, doing business under the name and style of “F. E. Wills”, and to set aside as fraudulent a pretended sale of a stock of drugs and fixtures, fraudulently transferred by John B. Wills to Leslie A. Wills, in fraud of the creditors of said John B. Wills, including appellee.

The complaint is in two paragraphs. In the first it is averred that defendants John B. and Flora E. Wills are indebted to appellee in the sum of \$111.55 as a balance due and unpaid on account of goods sold and delivered to said defendants, under the name and style of F. E. Wills, of which an itemized statement is filed with the complaint.

It is also averred that John B. Wills was the owner of a retail drug store at Cambridge City, Indiana, at and prior to the time of contracting the indebtedness to appellee; that in order to avoid the payment of his just debts, said John B. Wills operated said store in the name of F. E. Wills, who was the wife of John B. Wills, until August, 1908. The

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fraud charged in the first paragraph is that John B. Wills, with the knowledge and consent of F. E. Wills, for the purpose and with intent to cheat, hinder and delay his creditors, including appellee, and for the fraudulent purpose of preventing the collection of appellee's claim, for a nominal consideration, but for no actual consideration whatever, made a pretended sale and transfer of said retail drug store, with stock and fixtures, to appellant, Leslie A. Wills, who had full knowledge and notice of the fraudulent purpose and intent of said John B. Wills, so to hinder, delay and defraud his creditors, especially appellee.

The insolvency of John B. and F. E. Wills is averred, and the demand is for judgment against said parties for the balance due on account, as shown by the bill of particulars, together with interest, and that the pretended sale to Leslie A. Wills be adjudged fraudulent and void as to appellee, and that the goods remaining in the possession of said Leslie be adjudged to be the property of John B. Wills, and subject to the payment of appellee's judgment; that the proceeds of the sale of said goods so sold by said Leslie be adjudged to have been received by him in trust for appellee as a creditor of John B. Wills, and that he be required to account for all such sales, and ordered to pay the money received therefrom, or so much thereof as may be necessary, on appellee's claim and judgment.

The second paragraph is similar to the first, except the fraud charged is that John B. Wills, with the knowledge and consent of F. E. Wills, for the purpose and with intent to cheat, hinder, delay and defraud his creditors, including appellee, and for the fraudulent purpose of preventing the collection of appellee's claim, without any adequate consideration therefor, made a pretended sale and transfer of said drug stock and fixtures to Leslie A. Wills, who at and before such pretended sale had knowledge and notice of the fraudulent purpose of said John B. Wills to hinder, delay and defraud his creditors, especially appellee; that at the time

of the pretended sale, John B. Wills had, by the terms thereof, reserved and retained to himself a secret trust and ownership in said stock and fixtures, notwithstanding the pretended sale and transfer, and is still the owner of said drug stock and fixtures; that after said pretended sale, John B. Wills, with the knowledge and consent of said Leslie A. Wills, moved said stock and fixtures to the city of Indianapolis, and therewith established and operated, and still operates, a retail drug store; that he is in possession of the same, and selling at retail therefrom, for his own use and benefit, with the knowledge and consent of said Leslie, and has received the profits and the proceeds thereof. The insolvency of John B. and Flora E. Wills is averred, and the prayer is for judgment in the amount of appellant's claim, with interest, and that said pretended sale and transfer of the drug stock and fixtures from John B. Wills to Leslie A. Wills be adjudged fraudulent and void as to the plaintiff, and that the same be subjected to the payment of plaintiff's claim.

To each paragraph of complaint appellants separately demurred for want of sufficient facts to constitute a cause of action. The demurrers were overruled, and exceptions taken. Separate answers in general denial were filed by appellants to each paragraph of complaint.

The only point made against the sufficiency of either paragraph of the complaint is that the exhibit filed therewith is insufficient to constitute an account within the meaning of

§368 Burns 1908, §362 R. S. 1881. The exhibit filed

1. is a monthly statement of account, showing charges, credits and the balance due. This, we think, was sufficient fully to advise appellants of the nature and amount of the claim, and was sufficient to withstand demurrer. If the exhibit was not clear, it was the privilege of appellants to ask the court to require the same to be made more specific, which was not done.
- 2.

On request, the court made a special finding of facts and

stated conclusions of law thereon. It was found by the court that John B. Wills was the owner of the drug store in question, and that for more than three years prior to July 21, 1908, he carried on the business in and under the name of F. E. Wills; that under said name John B. Wills had purchased of appellee goods of the value of \$393.32, and had paid thereon the sum of \$280.77; that on April 1, 1908, there remained due and unpaid a balance of \$111.55, and which still remains due and unpaid, together with interest thereon; that F. E. Wills never at any time owned or had any title in or to said drug store, but knew that her husband was carrying on the business in her name; that on July 21, 1908, John B. Wills was indebted to divers persons in a sum in excess of \$2,509, more than \$1,000 of which was evidenced by judgments of record, and that more than \$1,000 of the remainder was incurred in the purchase of goods in the conduct of said drug business; that on said day the stock of goods, together with the fixtures and furniture in said drug store, was of the value of \$1,100, and that John B. Wills owned no other property of any kind, except \$775, then on his person and on deposit in bank.

By the sixth finding, the court found that on July 21, 1908, John B. Wills, for the purpose and with the intention of cheating, hindering, delaying and defrauding his creditors, including plaintiff, sold and transferred said stock of drugs and fixtures to defendant Leslie A. Wills, at and for the sum of \$800; that at the time of said sale and transfer, defendant Leslie A. Wills knew that John B. Wills was making said sale to him for the purpose and with the intention of cheating, hindering, delaying and defrauding his creditors, and preventing the collection of the indebtedness then existing, and that said Leslie then and thereby aided and assisted said John B. Wills in defrauding, hindering and delaying his creditors in the collection of their claims against said John B. Wills.

The court further found that immediately after the sale

and transfer of the drug stock, John B. Wills used and expended the sum of \$775, and the cash received on account of such sale, without paying any of his existing indebtedness, except to satisfy an existing claim of \$309 to Leslie A. Wills, and since said time has owned no property of any nature, except his wages of \$12 per week, which has been used, as received by him, for living expenses; that immediately after the sale and transfer of said drug store, the same was removed by Leslie A. Wills to Indianapolis, Indiana, who there established a retail drug store, and placed in charge thereof John B. Wills, as manager; that in the operation of said retail drug store, Leslie A. Wills has sold therefrom goods to the value of \$150, which he has applied to his own use and benefit.

The first conclusion of law stated by the court is in favor of defendant Flora E. Wills. The second conclusion states that the plaintiff is entitled to recover from John B. Wills the sum of \$121.94. The court by its third conclusion of law stated that the sale and transfer of the drug stock and fixtures by John B. Wills to Leslie A. Wills, and by Leslie removed to the city of Indianapolis, was and is fraudulent and void as to the creditors of John B. Wills, including plaintiff, and should be set aside and held void as against the plaintiff, and the property made subject to plaintiff's claim. The fourth conclusion is that Leslie A. Wills is trustee for the creditors of John B. Wills, including plaintiff, in the sum of \$150, the amount received by him as proceeds of sales made from the drug stock so sold and transferred to him by John B. Wills, and that plaintiff is entitled to recover from said Leslie the sum of \$121.94 and costs, not exceeding \$150, with relief.

Appellants separately excepted to each conclusion of law, and judgment was rendered against John B. Wills in the sum of \$121.94. It was further adjudged that the sale and transfer of the property described in the complaint and finding, and its removal to Indianapolis, is set aside, vacated

and annulled as against the plaintiff, and that said property, or so much thereof as may be necessary to pay and satisfy the judgment herein and costs, be sold, and the proceeds arising from such sale be applied to the payment of the judgment, interest and costs. It is further adjudged by the court that Leslie A. Wills is a trustee for the plaintiff in the sum of \$150, and that the plaintiff recover of said Leslie the sum of \$121.94, interest and costs, not exceeding in all the sum of \$150, with relief.

Appellants filed separate motions for a new trial, which motions were overruled, and each appellant has separately assigned error on the overruling of the motion for a new trial, and on his separate exception to each conclusion of law.

By statute (§7483 Burns 1908, §4924 R. S. 1881), fraud is made a question of fact, and it has frequently been held that fraud is never presumed nor inferred as a matter
3. of law, but must be established by proof, as other questions of fact, and, when averred, must be proved and found. *Lockwood v. Harding* (1881), 79 Ind. 129, 134; *Morris v. Stern* (1881), 80 Ind. 227, 231.

It is also a well-settled rule that an exception to a conclusion of law admits that the facts have not only been fully found, but have been correctly found, for the pur-
4. poses of the exception. But this rule is not of general application, and must be limited to the facts found within the issues formed by the pleadings. *Gardner v. Case* (1887), 111 Ind. 494, 498, 13 N. E. 36; *Thomas v. Dale* (1882), 86 Ind. 435, 438.

While the third conclusion of law follows the sixth finding of facts, counsel for appellants insist that the sixth finding is not within the issues. The second paragraph of com-
5. plaint, on which appellee relies to support the finding, is clearly on the theory that there was no actual sale, but simply a sham or pretended sale, wherein John B. Wills retained title and ownership in the store and stock of goods;

that he removed the stock to Indianapolis, with which he established a drug store, of which he is the owner and in possession, selling goods therefrom at retail for his own use and benefit; that this sham sale was for the purpose of cheating, delaying and defrauding the creditors of John B. Wills, of which purpose and intention appellant Leslie A. Wills had knowledge. These were the facts pleaded, on which appellee relies to establish fraud and support the finding. But the fraud averred was the fraud predicated on the facts pleaded. It is true, the second paragraph of complaint does say that the pretended sale was for no adequate consideration, but this adds nothing to it. The court, however, in the sixth finding of facts, found a state of facts altogether different from the facts alleged in the second paragraph of complaint. The court found that there was an actual sale by John B. Wills to Leslie A. Wills, at and for the sum of \$800; that Leslie A. Wills moved the stock to Indianapolis, and established a new drug store, which he owns and operates, and from which he receives the profits. The court also found that at the time of the sale to Leslie, he knew that John B. Wills was making said sale and transfer for the purpose and with the intention of defrauding his creditors, and that Leslie aided in the perpetration of such fraud.

We are not unmindful of the rule that grants relief to creditors from a fraudulent sale, even in a case where the consideration represents full value. *Gable v. Columbus Cigar Co.* (1895), 140 Ind. 563, 566, 38 N. E. 474; *Hoffman v. Henderson* (1896), 145 Ind. 613, 619, 44 N. E. 629. But in such case, the finding must be within the issues tendered by the complaint.

In *Armacost v. Lindley* (1888), 116 Ind. 295, 297, 19 N. E. 138, the court said: "It has often been decided that every pleading must proceed upon some single, definite theory, and that a party must stand or fall upon the theory of his case as he presents it in his pleadings. A recovery will be upheld only when the evidence and the facts found sup-

port the case made by the complaint.” This has long been the rule in Indiana.

It was said in *Boardman v. Griffith* (1875), 52 Ind. 101, 106: “When the trial of a cause is by the court instead of a jury, whether the court is required to find the facts specially or not, it cannot, any more than a jury can, go outside of the case made by the pleadings. In such cases, as well as in others, the parties must recover upon the allegations of the pleadings. They must recover *secundum allegata et probata* or not at all. It must be so in the nature of things, so long as our mode of administering justice prevails. It would be folly to require the plaintiff to state his cause of action, and the defendant to disclose his grounds of defense, if, on the trial, either or both might abandon such grounds and recover upon others which are substantially different from those alleged.” See, also, *Town of Cicero v. Clifford* (1876), 53 Ind. 191, 192; *Brown v. Will* (1885), 103 Ind. 71, 74, 2 N. E. 283; *Stevens v. Reynolds* (1896), 143 Ind. 467, 484, 41 N. E. 931, 52 Am. St. 422; *Hasselman v. Carroll* (1885), 102 Ind. 153, 155, 26 N. E. 202; *Louisville, etc., R. Co. v. Godman* (1885), 104 Ind. 490, 494, 4 N. E. 163.

As far back as the case of *Davis v. Cox* (1855), 6 Ind. 481, 484, Judge Stuart, made this admirable and succinct statement of the law: “It is not what the complainant alleges, simply without proving it, nor what he proves, without having alleged it, that is the measure of his remedy; but what he alleges and proves.”

Again in *McAroy v. Wright* (1865), 25 Ind. 22, Judge Fraser, speaking for the court, said: “No rule of law can possibly be better settled, and none is more necessary in the administration of justice, than that the plaintiff must recover upon his allegations, or not at all. If this were not so, it would be a mockery to require him to state a sufficient case in his complaint. Having thus stated his case, his proof ought to be confined to it, and if he has proved a different case, however meritorious, he should be defeated.”

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Following the law as declared by the cases herein quoted and cited, we must hold that the findings of the trial court, as the same affect Leslie A. Wills, are not within the 5. issues tendered by the complaint, and should be disregarded in stating the conclusions of law. It therefore follows that the court erred in stating the third and fourth conclusions of law, and in rendering judgment against Leslie A. Wills. This leads to an affirmance of the judgment against John B. Wills, and a reversal as to Leslie A. Wills, with instructions to the court below to strike out the third and fourth conclusions of law, and render judgment in favor of Leslie A. Wills, and against John B. Wills, on the second conclusion of law.

NOTE.—Reported in 97 N. E. 449. See, also, under (1) 1 Cyc. 370; (2) 31 Cyc. 644; (3) 20 Cyc. 108; (4) 38 Cyc. 1992 (5) 38 Cyc. 1968; (6) 20 Cyc. 814. As to due proof to establish fraud, see 11 Am. St. 757.

YOUNG v. WAGGONER ET AL.

[No. 7,528. Filed April 17, 1912.]

1. INJUNCTION.—*Timber Contract.—Interference with Rights.—Parties.*—In a suit to restrain a grantee of land from interfering with rights acquired by plaintiffs under a timber contract executed between plaintiffs and the grantor prior to the conveyance, and of which the grantee had notice, where it does not appear from the complaint that the grantor owned or was asserting any interest in the land at the time the action was brought, such grantor was not a necessary party defendant. p. 205.
2. INJUNCTION.—*Timber Contract.—Defective Description of Land.—License to Cut and Saw Timber.—Complaint.—Sufficiency.*—In a suit to restrain a grantee of land from interfering with rights acquired under a timber contract, where the complaint averred that the consideration for the contract had been paid, that plaintiffs had entered into possession under its terms, and that the interest of such grantee in the land was acquired with full notice of plaintiffs' rights, an irrevocable license to cut and saw the timber was shown, and the complaint was sufficient, although the description of the land in such contract may have been insufficient to convey an interest in real estate. p. 205.

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3. **LICENSES.—Revocation.—Consideration.—Restoration.—Necessity.**—Although at common law a mere license to enter on real estate is revocable at the pleasure of the licensor, on principles of equity the licensor, or, in the event of a conveyance, the grantee with notice, is estopped from revoking a license after it has been acted on and money has been expended on the faith thereof, without placing the licensee in *statu quo*. p. 205.
4. **APPEAL.—Review.—Decision of Court.—Insufficient Evidence.**—In a suit to restrain the interference with rights under a license to cut timber, although the defendant acquired his interest in the land with full knowledge of the license and the rights of plaintiffs thereunder, the decision of the court in favor of plaintiffs was not supported by the evidence, where it was not shown that defendant's grantor, who was the grantee of the licensor, had neither actual nor constructive notice of the existence of plaintiff's claim to the timber. p. 206.
5. **VENDOR AND PURCHASER.—Bona Fide Purchaser.—Secret Equities.**—A *bona fide* purchaser of real estate without notice takes the same free from secret equities, and after acquired notice does not affect his rights. p. 206.
6. **VENDOR AND PURCHASER.—Bona Fide Purchaser.—Rights of Purchaser with Notice from Purchaser Without Notice.**—A purchaser of land, with notice of secret equities, from a purchaser thereof without notice, succeeds to all the rights of his grantor. p. 207.
7. **VENDOR AND PURCHASER.—Bona Fide Purchaser.—Presumption—Burden.**—The law presumes the grantee in a deed to be a *bona fide* purchaser, and the burden of overcoming this presumption rests upon him who seeks to impeach the title. p. 207.

From Pulaski Circuit Court; *Francis J. Vurpillat*, Judge.

Action by John C. Waggoner and another against John A. Young. From a judgment for plaintiffs, the defendant appeals. *Reversed*.

Frank V. Guthrie, for appellant.

Truman F. Palmer, Benj. F. Carr, and George Burson, for appellees.

IBACH, P. J.—In brief, the essential averments of the amended second paragraph of complaint, on which judgment was rendered, are the following: On April 29, 1908, Samuel A. Royer was the owner of a certain described farm of eighty acres in White county, Indiana. On that date, by an agreement in writing, a copy of which is set out, he sold to

plaintiffs all the timber above a certain size on this farm, and agreed to allow them to erect on the land a sawmill, in order to saw the timber. The consideration for this agreement was \$350, then and there paid by plaintiffs. Plaintiffs took possession of the real estate under the agreement for the purposes of cutting timber, and continuously occupied it for that purpose until prevented by the acts of defendant, later set forth, during which time they cut a considerable portion of the standing timber. Defendant now claims to be the owner of said real estate, and ignores plaintiffs' rights to possession of the cut and standing timber, has locked the gates through which they might have entered on the land, refuses to allow them to enter thereon, has taken possession of the cut and standing timber, refuses to surrender the same, and refuses to allow them to erect a sawmill, or in anywise to exercise the rights and privileges granted them on the premises by the agreement with Royer. If defendant has any right of ownership in the real estate, it was acquired by him and by those through whom he claims after the execution of said agreement, and with full knowledge, by him and those through whom he claims of the occupancy of the premises by plaintiffs under said agreement. By reason of the wrongful conduct of defendant, plaintiffs are unable to obtain possession of their property, and thereby suffer great loss—the sum of \$2,000—and they have no adequate means at law to recover possession of their property, and if defendant shall not be restrained from interfering with their rights, they will suffer great additional damage. Plaintiffs have in nowise violated the terms of their agreement, and they pray permission to go on the lands and erect a sawmill, cut the timber standing, and saw that already cut, and that they be adjudged the owners of the timber, and that defendant be restrained from interfering with their rights in the premises as determined by said agreement.

On trial by the court, appellees recovered judgment according to the prayer of their complaint.

The complaint is good as against the objections urged. It was not necessary to join Royer as a party, for he was not a party in interest, and this was not a suit to enforce

1. the contract between Royer and appellees, but to restrain appellant from interfering with rights already acquired by appellees, with notice to appellant, under such contract, and it does not appear from the complaint that at the time of bringing this action Royer owned or was asserting any interest in the land. If in the written agree-

2. ment between Royer and appellees, the description of the land on which the timber is situated is insufficient to convey an interest in real estate, which we need not and do not decide, yet such agreement would give to appellees a license to go on the lands and cut the trees, erect a sawmill, and saw the timber. It is averred that the consideration for this contract had been paid, and that appellees had entered into possession of the land under its terms, and also that whatever interest in the land may have been acquired by appellant and his grantors was acquired with full notice of the rights of appellees. The license having thus been acted on, it was irrevocable, and appellant and his grantors having notice, the complaint was good against appellant.

On strict common-law principles, it may be said that a mere naked license to enter on real estate is revocable at the pleasure of the licensor, but on principles of equity

3. the revocation of a license after it has been acted on, and money has been expended on the faith thereof, without placing the licensee in *statu quo*, would amount to a constructive fraud, and would work an estoppel in such licensee's favor. The same rule would apply to the grantee of the licensor, who, with full notice and knowledge of the license, and that the licensee had expended money and performed labor on the faith of such license, purchased the land. *Buck v. Foster* (1897), 147 Ind. 530, 46 N. E. 920, 62 Am. St. 427; *Watson v. Adams* (1904), 32 Ind. App. 281, 69 N. E. 696; *Miller v. State* (1872), 39 Ind. 267; *Messick v. Mid-*

land R. Co. (1891), 128 Ind. 81, 27 N. E. 419; *Hodgson v. Jeffries* (1876), 52 Ind. 334; *Stoner v. Zucker* (1906), 148 Cal. 516, 83 Pac. 808, 113 Am. St. 301, 7 Ann. Cas. 704 and note.

It appears from the evidence that the agreement between Royer and appellees was executed, and the consideration paid as alleged in the complaint. On August 15, 1908,

4. Royer conveyed, by warranty deed, the same farm on which the timber was situated, for the consideration of \$3,600, to James M. Million and Queen V. Million, his wife. By warranty deed, dated February 6, 1909, delivered February 28, 1909, this same farm was conveyed by the Millions to appellant, for the consideration of \$4,000. There is evidence that appellees marked the trees in July or August, 1908. In December, 1908, after the Millions had entered into possession of the land appellees entered thereon and began to cut timber, but were ordered by James M. Million to stop. They continued cutting, and had most of the timber cut when appellant took possession of the land in March, at which time he forbade appellees coming on the premises to remove the logs cut, and locked the gates. Appellees then brought this action.

The evidence fails to support the decision of the court, for the reason that it is not shown that James M. and Queen V. Million, or either of them, at the time of purchasing the land, had any notice of the existence of any claim of appellees to the timber. Appellees' contract was not recorded, and had been made more than forty-five days before the date of the conveyance to the Millions. Even though there is testimony that the trees had been marked, it does not appear either that the Millions knew this, or had means of knowing it, and, so far as the record shows, the Millions took the land without either actual or constructive notice of appellees' claim.

5. They became *bona fide* purchasers, and appellees can assert no rights against them, for a *bona fide* purchaser of real estate without notice takes free from secret

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equities. Notice obtained after the purchase has been completed by payment of the consideration and transfer of title does not affect the purchaser's right to protection in the estate acquired. 23 Am. and Eng. Ency. Law (2d ed.) 475, 522; 2 Pomeroy, Eq. Jurisp. §754.

It is immaterial whether appellant had notice. His testimony is that he had no actual notice, but there are facts from which the court might have found constructive notice.

6. The rule is that a purchaser with notice from a purchaser without notice succeeds to all the rights of his grantor. 2 Pomeroy, Eq. Jurisp. §754; *Buck v. Foster, supra*; *Brown v. Budd* (1850), 2 Ind. *442; *Brown v. Cody* (1888), 115 Ind. 484, 18 N. E. 9; *McShirley v. Birt* (1873), 44 Ind. 382; *Citizens St. Bank v. Julian* (1900), 153 Ind. 655, 55 N. E. 1007.

Appellees, in order to assert their claim against appellant, must prove that appellant's grantors had notice of appellees' claim. In the absence of evidence, the law pre-

7. sumes a grantee in a deed to be a *bona fide* purchaser, and the burden of overcoming this presumption rests on the person seeking to impeach the title. *Citizens St. Bank v. Julian, supra*.

For the error pointed out, the cause is reversed, and remanded for new trial.

Judgment reversed.

NOTE.—Reported in 98 N. E. 145. See, also, under (1) 22 Cyc. 912; (2) 22 Cyc. 924; (3) 25 Cyc. 646; (5) 39 Cyc. 1774; (6) 39 Cyc. 1773; (7) 39 Cyc. 1781. As to what notice, by a licensee to cut timber, is implied so as to affect a purchaser of the land, see 104 Am. St. 342. The question of the revocability of a license to maintain burden on land after licensee has incurred expense is considered in an extension note in 49 L. R. A. 497 and in supplemental notes in 19 L. R. A. (N. S.) 700 and 25 L. R. A. (N. S.) 727.

**STATE OF INDIANA, EX REL. TOWN OF SELMA, v.
LIBERTY TOWNSHIP, DELAWARE COUNTY.**

[No. 7,541. Filed April 17, 1912.]

1. **PLEADING.—Demurrer for Want of Facts.—Right of Plaintiff to Maintain Action.**—A demurrer for want of facts challenges the authority or right of the plaintiff to maintain the action stated in the pleading to which it is addressed. p. 210.
2. **ACTIONS.—Action by Town to Recover Taxes Withheld by Township.—Real Party in Interest.—Right to Maintain in Name of State, ex rel.**—The right to maintain an action to recover taxes alleged to be wrongfully withheld by a township from a newly incorporated town within the township, in the absence of any statute authorizing the bringing of such action in the name of the "State, ex rel.", is controlled by §§251, 252 Burns 1908, §§251, 252 R. S. 1881, requiring every action to be prosecuted in the name of the real party in interest, except as therein otherwise provided, so that where such action was brought in the name of the State, ex rel., a demurrer to the complaint for want of facts was properly sustained. pp. 211, 213.
3. **EQUITY.—Suits.—Real Party in Interest.**—As a general rule a suit in equity must be prosecuted in the name of the real party in interest. p. 213.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Action by State of Indiana, on the relation of the Town of Selma, against Liberty Township, Delaware County. From a judgment for defendant, the relator appeals. *Affirmed.*

J. Frank Mann, for appellant.

George H. Koons and *George H. Koons, Jr.*, for appellee.

HOTTEL, J.—Prior to the year 1907, when it was incorporated, the town of Selma, Indiana, was an unincorporated town, and a part of Liberty township, Delaware county, for all governmental purposes. In that year the tax levy for road and township purposes was levied against all the property of the township, including that in the town of Selma, and was collected by the county treasurer, and paid over to the township trustee. This is a suit in equity to require the

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payment to said town of Selma of such part of said taxes as was paid by its citizens.

A demurrer for want of facts was sustained to appellant's complaint, and alleged error in such ruling is the only question here presented.

The complaint, after alleging the facts with reference to the incorporation of said town and the levy of the tax in 1907, further avers that in accordance with said tax levy of 1907 there was collected by said county treasurer of Delaware county from owners of property situated in said incorporated town of Selma and paid to defendant township, the following sums, viz.: On account of the levy for township purposes, \$75.24, on account of the levy for road purposes, \$153.24. The election of the trustee of said township, and the turning over of said funds to him as the custodian thereof, are alleged, together with other averments showing that appellee was not authorized to expend any part of the sums so collected for the benefit of appellant; that appellee has incurred no obligations or indebtedness chargeable against said funds, or either of them, for any portion of which the property in said town would be chargeable, or which were incurred for the benefit of appellant, or the property situated within its boundaries; that appellant has regularly made demand through its clerk for said taxes, which demand has at all times been refused by appellee; that the sums so demanded are wrongfully withheld from appellant by appellee; "wherefore, the plaintiff demands judgment against the defendant in the sum of two hundred and fifty dollars, and all proper relief."

The question presented which should be first considered is the authority of appellant to maintain this suit. In this connection it is insisted by appellant that the demurrer stated but one ground, viz., that the complaint did not state facts sufficient, and that this raises no question as to defect of parties. It is true that a defect of parties plaintiff, apparent

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on the face of the complaint, constitutes the fourth ground of demurrer under §344 Burns 1908, §339 R. S. 1881, as appellant contends, but as we view the question here presented, it is not one of defect of parties, but one involving the right of the plaintiff to maintain the action.

It has been held frequently by this court and the Supreme Court, that a demurrer for want of facts challenges the authority or right of the plaintiff to maintain a suit

1. on the cause of action stated in the pleading, to which such demurrer is addressed. *State, ex rel., v. Karr* (1906), 37 Ind. App. 120, 122, 76 N. E. 780; *Farris v. Jones* (1887), 112 Ind. 498, 503, 14 N. E. 484; *Pence v. Aughe* (1885), 101 Ind. 317; *Wilson v. Galey* (1885), 103 Ind. 257, 2 N. E. 736; *Walker v. Heller* (1885), 104 Ind. 327, 3 N. E. 114; *Frazer v. State* (1886), 106 Ind. 471, 7 N. E. 203; *Kinsley v. Kinsley* (1898), 150 Ind. 67, 69, 49 N. E. 819; *Martin v. Caldwell* (1911), 49 Ind. App. 1, 96 N. E. 660.

In this connection it is insisted by appellee: (1) That “the State * * * cannot espouse the cause of, or lend its aid to the Town of Selma in an attempt to enforce a mere equity or equitable right as against Liberty township.” (2) That “the writ of mandate is only used to enforce obligations imposed by law, and not those arising out of contract.” In support of this last proposition appellee cites *State, ex rel., v. Trustees, etc.* (1888), 114 Ind. 389, 16 N. E. 808; *Indiana, etc., R. Co. v. Rinehart* (1896), 14 Ind. App. 588, 43 N. E. 238, and *Vandalia R. Co. v. State, ex rel.* (1906), 166 Ind. 219, 76 N. E. 980, 117 Am. St. 370. (3) That “mandate is the proper remedy to compel an officer to perform an official duty, and any person having an interest in the matter may apply for the writ.” In support of this proposition appellee cites *Henderson v. State, ex rel.* (1876), 53 Ind. 60; *Holliday v. Henderson* (1879), 67 Ind. 103; *State, ex rel., v. Spinney* (1906), 166 Ind. 282, 76 N. E. 971, and *King v. Board, etc.* (1904), 34 Ind. App. 231, 72 N. E. 616.

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Appellee's said second and third propositions are supported by the authorities cited, and, as we understand, are not disputed by appellant. It is contended by appellant, in this connection, that the complaint does not proceed on the theory of appellant's right to mandate appellee to pay the money sued for; but that, on the contrary, its averments show that "no right of action by mandate rests in appellant," because such writ "will not be issued by a court to require the payment of a sum of money to another until the amount alleged to be due has been determined by a judicial tribunal, or by some officer authorized by law to determine the same."

Appellant's contention, that the complaint does not proceed on the theory of a right of action by mandate, is correct, but this furnishes no ground or reason for ap-

2. pellant's right or authority to sue as it does. If in fact this action were one to compel by mandate the officer having custody of said funds to turn the same over pursuant to some statutory requirement or mandate, there might then be reason and authority for bringing the action in the name of the State, ex rel., but no such reason or authority exists for bringing the action relied on in this complaint. It is conceded by appellant that it has no legal right, given either by statute or contract, to the funds sued for, but that its right is wholly equitable. The complaint shows no right of ownership in the State to any of the funds sued for, nor does it show that the State has any interests in any part of said funds, nor that the retention of said funds is in violation of any law of the State. While we have been unable to find a case presenting the exact question here presented, we think the question under consideration is controlled by §§251, 252 Burns 1908, §§251, 252 R. S. 1881. Said §251 is as follows:

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

The “next section” referred to, viz., §252, furnishes no authority for bringing actions of the character set out in this complaint in the name of the “State, ex rel.”

In the case of *State, ex rel., v. Shively* (1882), 10 Or. 267, the Supreme Court of that state said: “And the question which confronts us at the threshold of our inquiry, is the right of the relators to carry on a litigation in the name of the state for the objects sought by the suit, and the authority of the court, in a case so constituted, to adjudicate upon it. For it will hardly be asserted, if the subject-matter of the litigation concerns the rights of private parties only and exclusively, and the state has no direct interest in the prosecution or result of the suit, that state interference in such controversies ought not to be countenanced, or tolerated, either directly or upon the relation of private parties. When a remedy is provided, either at law or in equity, complete and adequate, by which matters in dispute between private parties may be adjusted and settled, that remedy must be pursued by them; the state cannot lend the power of its name, or invidiously assume and champion the cause of one private citizen against another for the purpose of settling rights or titles in controversy between them, when each and all citizens are equally entitled to its protection.”

Many cases might be cited from other states, where the action was brought in the name of the People or State, ex rel. Attorney-General, the reasoning of which, by analogy at least, is applicable to the question here considered. For this line of cases see: *Attorney-General v. Moliter* (1873), 26 Mich. 444, 447, 448; *People v. Ingersoll* (1874), 58 N. Y. 1, 17 Am. Rep. 178; *State v. Desforges* (1843), 5 Rob. (La.) 253, 261; *People v. Booth* (1865), 32 N. Y. 397, 398; *People v. Equity Gas Light Co.* (1894), 141 N. Y. 232, 239, 36 N. E. 194; *Attorney-General, ex rel., v. Albion Academy, etc.* (1881), 52 Wis. 469, 9 N. W. 391.

It is a general rule that “a suit in equity cannot be brought in the name of one party for the use or benefit of

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another. It not only may, but must, be prosecuted in
3. the name of the real party in interest.” 16 Cyc. 197.

See, also, *Elder v. Jones* (1877), 85 Ill. 384; *Kellam v. Sayer* (1887), 30 W. Va. 198, 3 S. E. 589.

Appellant has not called our attention to any statute authorizing the bringing of an action of this character in the name of the “The State, ex rel.” and we know of no such statute.

In the absence of such a statute, we think that, under the authorities above cited and quoted from, appellant had no right or authority to sue on the cause of action stated in its complaint, and that the demurrer to the complaint, for want of sufficient facts, was properly sustained. There are possibly other reasons why such demurrer should have been sustained, but these we need not consider.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 149. See, also, under (1) 31 Cyc. 314; (2) 30 Cyc. 44; (3) 16 Cyc. 182.

JORDAN ET AL. v. JOHNSON ET AL.

[No. 7,583. Filed April 17, 1912.]

1. SPECIFIC PERFORMANCE.—*Contract for Sale of Land.—Bond.—Rights of Purchaser.*—Where an instrument is in the form of a bond for the payment of money, conditioned to be void on the conveyance of real estate, the penalty will be regarded as a mere security for the conveyance of the land, so that the purchaser may elect to sue for specific performance instead of relying on the remedy for damages, unless a contrary intent is clearly shown by the terms of the instrument. p. 217.
2. SPECIFIC PERFORMANCE.—*Contract for Sale of Land.—Contract in Form of Bond.—Sufficiency.*—An instrument which shows the parties and the terms of an executory contract for the sale of land, and so identifies the property as to afford the means of a description in the conveyance, is sufficient and equity will decree its specific performance, although it is technically in the form of a bond. p. 218.
3. SPECIFIC PERFORMANCE.—*Contracts for the Sale of Land.—Remedy Against Purchaser With Notice of Contract.*—Where a vend-

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or, in violation of his agreement to convey land to one person, conveys it to another with notice of the contract, the first vendee may compel the latter specifically to perform the grantor's contract. p. 218.

4. **VENDOR AND PURCHASER.**—*Contracts for the Sale of Land.—Rights of Parties.*—Where an executory contract has been made for the sale of land, equity regards the vendee as the owner, and the vendor as seized of the title in trust for the purchaser, with a lien on the land for the purchase money. p. 218.
5. **SPECIFIC PERFORMANCE.**—*Contract for the Sale of Land.—Tender of Purchase Price.*—Where a vendor has violated his executory contract for the sale of land, the vendee may have specific performance without an unconditional tender of the balance of the purchase money, where he shows his readiness and willingness to perform his part of the contract on compliance therewith by the grantor. p. 219.
6. **SPECIFIC PERFORMANCE.**—*Contract for the Sale of Land.—Necessity for Demand.*—Where a vendor repudiates his contract to convey real estate, and denies the right of the other party to receive the title, a demand for a conveyance is not necessary before suit for specific performance. p. 219.

From Knox Circuit Court; *George W. Buff*, Special Judge.

Action by Samuel A. Jordan and another against Mary L. Johnson and others. From a judgment for defendants, the plaintiffs appeal. *Reversed.*

A. T. Cobb, W. A. Cullop and George W. Shaw. for appellants.

S. M. Emison, B. M. Willoughby and James M. House, for appellees.

FELT, C. J.—Appellants brought this action for specific performance of a contract by appellees, Mary L. Johnson and Clark Johnson, for the sale and conveyance to appellants of certain real estate. The complaint was in one paragraph, to which appellees' several demurrer was sustained, and the alleged error in such ruling is the only question presented by this appeal.

The complaint, in substance, charges that on and prior to February 10, 1909, appellees Johnson and Johnson were hus-

band and wife, and on and prior to said day said Mary L. Johnson was the owner in fee simple of certain described real estate situate in Knox county, Indiana; that on said day appellants, by their attorney, entered into a certain written contract with appellees Johnson and Johnson, by which said appellees sold said real estate to appellants, and agreed to execute and deliver to them a warranty deed therefor on the payment of the balance of the purchase money, a partial payment having been made; that appellants found the title to said real estate satisfactory to them, and on February 12, 1909, were ready and willing to carry out their part of said agreement, and offered to pay to said Mary L. Johnson the balance of the purchase money for said real estate. The complaint further avers that appellants kept and performed all the terms and conditions of said contract to be by them performed, but that they did not make actual tender of the balance of said purchase money or demand the execution of a deed, because, before the time arrived when, by the terms of said contract, they were entitled to a deed, and the balance of the purchase money became due and payable, said appellees Johnson and Johnson repudiated said contract, and on February 12, 1909, while said agreement was still in force, without the knowledge or consent of appellants, sold and conveyed said real estate to appellee James D. Sisson, who ever since has claimed to own the same by reason of such conveyance; that by reason of such repudiation and conveyance said Johnson and Johnson violated said contract, and disabled themselves from executing the deed as therein provided; that appellee Sisson, at the time he so purchased said real estate, had personal knowledge of the existence of said contract between appellants and appellees Johnson and Johnson, and knew that it was then in full force and effect; that with full knowledge of said facts, he wrongfully and fraudulently entered into a conspiracy with said Johnson and Johnson to defraud appellants out of said real estate, and for the purpose of carrying out said conspiracy, said Sisson offered

to said Johnson and Johnson, and induced them wrongfully and fraudulently to accept, a sum of money for said real estate in excess of the amount to be paid therefor by appellants; that a deed of conveyance for said real estate has been executed to said Sisson by said Johnson and Johnson, and has been duly recorded in the public records; that appellants are ready and willing to bring into court for the use and benefit of appellees, the balance of said purchase money to be paid by them, and to do and perform such other acts in the premises as the court may direct. Prayer for specific performance of the contract, and the appointment of a commissioner to convey the title.

The alleged contract and the deed to Sisson are made exhibits with the complaint.

The instrument relied on is as follows:

“BOND FOR A DEED.

Know all men by these presents that we, Mary Louise Johnson, and Clark Johnson, her husband, of Knox County, in the State of Indiana, are holden and stand firmly bound unto S. A. Jordan and A. J. Jordan, doing business under the firm name of Jordan Brothers in said county, in the sum of five thousand dollars (\$5,000) to the payment of which to the said obligees or their executors, administrators or assigns, I hereby bind myself, my heirs, executors and administrators. The condition of this obligation is such, that whereas, the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate situated in said county, described as follows: (description of property); the same to be conveyed by a good and sufficient warranty deed of the said obligor, conveying a good and clear title to the same, free from all incumbrances. It is further agreed and understood between the parties hereto that the said obligor shall furnish to said obligees an abstract of title to the said real estate which shall show said title to said real estate to be in a condition satisfactory to said obligees. And whereas for such deed and conveyance it is agreed that the said obligees shall pay the sum of thirty-six hundred dollars (\$3,600) of which the sum of ten dollars (\$10) have been paid on this day, and thirty-five hundred and ninety dol-

lars (\$3,590) are to be paid in cash upon the delivery of said deed and the acceptance thereof solely conditioned upon the title to said real estate being satisfactory to said obligees, then this obligation shall be void, otherwise it shall be and remain in full force and virtue. In witness we have hereunto set our hands and seals this 10th day of February, A. D. 1909.

Mary Louise Johnson,
Clark Johnson,
S. A. Jordan,
A. G. Jordan, by
Arthur T. Cobb, Attorney-at-Law."

The sufficiency of the complaint depends on the meaning and effect of the title bond or contract.

Appellees assert that the complaint is insufficient because (1) the parties have provided a penalty in damages for a breach of the contract, which is the only remedy available; (2) the terms of the instrument do not evidence a contract of sale, and are not sufficiently definite and certain to enable the court to award specific performance; (3) the tender is insufficient.

Appellants assert the sufficiency of the instrument to evidence a contract of sale, and their right to choose the equitable remedy instead of suing for damages for the breach of the covenant to convey.

Where an instrument is in the form of a bond for the payment of money, conditioned to be void on the conveyance of

real estate, the courts regard the penalty as a mere

1. security for the conveyance of the land, unless the instrument clearly indicates a contrary meaning. The purchaser may elect to sue for specific performance, and cannot be compelled to rely on the remedy for damages, unless, by the terms of the instrument, he is clearly limited to such action. 1 Pomeroy, Eq. Jurisp. §446; *Dooley v. Watson* (1854), 1 Gray (Mass.) 414; *Ewins v. Gordon* (1870), 49 N. H. 445, 457; *Hubbard v. Johnson* (1885), 77 Me. 139; *Martin v. Colby* (1886), 42 Hun 1; *Wilson v. Emig* (1890), 44 Kan. 125, 24 Pac. 80.

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If an instrument is sufficient to show the parties and the terms of an executory contract for the sale of land, and so identifies the property as to afford the means of a de-

2. scription in the conveyance, it will not be held insufficient because in the form of a bond with penalty. An agreement to convey embraces that to sell, and equity will decree the specific performance of the contract, though technically in the form of a bond. *Martin v. Colby, supra*; *Thornburgh v. Fish* (1891), 11 Mont. 53, 61, 27 Pac. 381; 36 Cyc. 552 *et seq.*; *Plunkett v. Methodist Episcopal Society, etc.* (1849), 3 Cush. (Mass.) 561, 566; *Dooley v. Watson, supra*; *Hemming v. Zimmerschitte* (1849), 4 Tex. 159, 164; *Ewins v. Gordon, supra*; *St. Paul Division, etc., v. Brown* (1864), 9 Minn. 157; *Engler v. Garrett* (1905), 100 Md. 387, 397, 59 Atl. 648.

If a vendor, after contracting to convey land to one person, in violation of his agreement, conveys it to another with notice of the contract, the latter may be compelled by

3. the first vendee specifically to perform the contract of his grantor. *Earle v. Peterson* (1879), 67 Ind. 503, 511; *Heck v. Fink* (1882), 85 Ind. 6; *Forthman v. Deters* (1903), 206 Ill. 159, 69 N. E. 97, 99 Am. St. 145; *Frank v. Stratford-Hancock* (1904), 13 Wyo. 37, 77 Pac. 134, 110 Am. St. 963, 67 L. R. A. 571; *Handy v. Rice* (1904), 98 Me. 504, 509, 57 Atl. 847; *Young v. Young* (1889), 45 N. J. Eq. 27, 16 Atl. 921; *Wilson v. Emig, supra*; *Farrar v. Patton* (1854), 20 Mo. 81.

Where an executory contract has been made for the sale of land, equity looks on the vendee as the owner, and the vendor as seized of the title in trust for the purchaser,

4. with a lien on the land for the purchase money. 1 Story, Eq. Jurisp. (12th ed.) §789; *Walker v. Cox* (1865), 25 Ind. 271, 273; *Hunter v. Bales* (1865), 24 Ind. 299, 302; *Hubbard v. Johnson, supra*; *Engler v. Garrett, supra*.

~ A vendee under an executory contract for the sale of real

estate, on a violation of the contract by his vendor, may have specific performance of his contract without an unconditional tender of the balance of the purchase money, where he shows his readiness and willingness to perform all the requirements of his contract on compliance therewith by his grantor. *Marlin v. Merritt* (1877), 57 Ind. 34, 26 Am. Rep. 45; *Horner v. Clark* (1901), 27 Ind. App. 6-13, 60 N. E. 732; *Turner v. Parry* (1866), 27 Ind. 163; *St. Paul Division, etc., v. Brown* (1864), 9 Minn. 157; *Forthman v. Deters* (1903), 206 Ill. 159, 69 N. E. 97, 99 Am. St. 145.

If a person repudiates a contract to convey real estate, and denies the right of the other party to receive the title, a demand for a conveyance is not necessary before suit for specific performance. *Harshman v. Mitchell* (1889), 117 Ind. 312, 20 N. E. 228; *Lynch v. Jennings* (1873), 43 Ind. 276.

Applying the principles above enunciated to the case at bar, we are forced to the conclusion that the instrument in question, though technically in the form of a bond, contains all the essentials of an executory contract to convey real estate; that the penalty is a security for the obligation to convey the land, and the court may decree specific performance; that the complaint shows a breach of the contract and a performance and a willingness to perform on the part of appellants, sufficient to entitle them to the relief prayed; that the grantee in the deed executed by Johnson and Johnson accepted the same with notice of the rights of appellants, and cannot hold the title against appellants on proof of the facts alleged in the complaint.

The judgment is therefore reversed, with instructions to the trial court to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 98 N. E. 143. See, also, under (1) 36 Cyc. 571; (2) 36 Cyc. 590; (3) 36 Cyc. 761; (4) 39 Cyc. 1303; (5, 6) 36 Cyc. 705, 706. For a discussion of the right of vendee in con-

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tract to convey realty to specific performance of contract as against purchaser from vendor. see 17 Ann. Cas. 1036. As to a vendor's disabling himself to perform, by conveying to third person, see 106 Am. St. 973.

**BALTIMORE AND OHIO SOUTHWESTERN RAILROAD
COMPANY v. TRUSTEES OF TUNNELTON LODGE
No. 168, K. OF P., ET AL.**

[No. 7,548. Filed April 18, 1912.]

1. **TRIAL.—Instructions.—Construed as a Whole.**—A cause will not be reversed because a particular instruction may be erroneous where the instructions, when taken as a whole, correctly state the law applicable to the entire case. p. 222.
2. **TRIAL.—Instructions.—Refusal.**—Where instructions tendered were completely covered by others given by the court, their refusal was not error. p. 222.
3. **RAILROADS.—Operation.—Fires.—Evidence.—Sufficiency.**—In an action against a railroad company to recover for the destruction of a building by fire, evidence that defendant's engine threw cinders which fell in showers a distance of more than 250 feet from the railroad, and that fires were started along the railroad right of way immediately after the passage of the engine, fully warranted the jury in finding that the destruction of the building was caused by the negligence of defendant. p. 223.

From Monroe Circuit Court; *John C. Robinson*, Special Judge.

Action by the Trustees of Tunnelton Lodge No. 168 K. of P. against the Baltimore & Ohio Southwestern Railroad Company. The Hartford Fire Insurance Company was made a party defendant on motion of the defendant. From a judgment for plaintiff, the defendant railroad company appeals. *Affirmed.*

W. R. Gardiner, C. K. Tharp, C. G. Gardiner and Edward Barton, for appellant.

Brooks & Brooks, for appellees.

HOTTEL, J.—Appellees, trustees of said lodge, sued appellant to recover damages on account of destruction of proper-

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ty by fire, alleged to have resulted from appellant's negligence. The property destroyed was a building in the town of Tunnelton, Lawrence county, Indiana, owned by the Knights of Pythias lodge of said town, together with certain furnishings and paraphernalia belonging to the members of said lodge.

A substituted complaint in three paragraphs, with a general denial to each, presents the litigated issues tendered by the pleadings.

Appellee Hartford Fire Insurance Company was, on motion of appellant, made a defendant to answer as to its interest in the cause of action, on account of its having insured a part of the property destroyed, and because, under its policy, it had the right, under certain conditions, to be subrogated to the rights of its coappellee for the amount of insurance paid to it. Said insurance company filed a cross-complaint, setting up substantially the same cause of action against appellant as that alleged in the complaint, and claiming the right to be subrogated to the rights of its coappellee to the extent of the insurance money paid to it.

No question is raised as to the sufficiency of either the complaint or the cross-complaint, nor is the right of said insurance company to subrogation as prayed questioned, and no further notice of its connection with the case need be taken. A trial by jury resulted in a verdict for appellee in the sum of \$2,500, on which the judgment herein appealed from was rendered. A motion for a new trial was overruled, and the ruling on this motion presents the only error assigned and relied on.

The grounds of this motion first discussed relate to the instructions. It is urged that error resulted, harmful to appellant, on account of the refusal of the court below to give each of certain instructions tendered by appellant, and on account of the court on its own motion giving certain other instructions.

No good purpose could be served by copying into this opin-

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ion, in whole or in part, the several refused and given instructions, on which such errors are predicated, together with the opinion of the court thereon. It is

1. sufficient to say generally, with reference to the instructions given in the case, that, when taken as a whole, they correctly and accurately state the law applicable to the entire case. They are eminently fair, and gave to appellant no ground for complaint, but, on the contrary, gave it the advantage of every principle of law favorable to its contention which could be said to be applicable, either to the facts on which appellee had the burden of proof, under the complaint, or applicable to the facts of any phase of the

2. defense presented by the evidence. As to the refused instructions, they were, in the main, a correct statement of the law applicable to the case, but, in so far as they were correct and applicable, they were completely covered by others given by the court, and to have given those refused would have involved repetition, which is a practice to be criticised rather than encouraged. It is not necessary to repeat an instruction already given, simply because it appears among those tendered by one of the parties to the suit. *Home Ins. Co. v. Sylvester* (1900), 25 Ind. App. 207, 214, 215, 57 N. E. 991; *Oil Well Supply Co. v. Priddy* (1908), 41 Ind. App. 200, 204, 83 N. E. 623; *New York, etc., R. Co. v. Flynn* (1908), 41 Ind. App. 501, 503, 81 N. E. 741, 82 N. E. 1009.

“It is settled law in this State that instructions are considered with reference to each other, and as an entirety, and not separately or in dissected parts; and if the instructions as a whole correctly and fairly present the law to the jury, even if some particular instruction, or some instruction standing alone, or taken abstractly, and not explained or qualified by others, may be erroneous, the cause will not be reversed.” *Eacock v. State* (1907), 169 Ind. 488, 502, 82 N. E. 1039. See, also, *Rains v. State* (1899), 152 Ind. 69, 74, 52 N. E. 450; *Shields v. State* (1897), 149 Ind. 395, 406, 49

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N. E. 351; *Indianapolis, Traction, etc., Co. v. Miller* (1907), 40 Ind. App. 403, 407, 82 N. E. 113; *Indianapolis, etc., R. Co. v. Bennett* (1906), 39 Ind. App. 141, 143, 79 N. E. 389; *Cleveland, etc., R. Co. v. Heineman* (1910), 46 Ind. App. 388, 392, 90 N. E. 899; *Sterling v. Frick* (1909), 171 Ind. 710, 715, 86 N. E. 65, 87 N. E. 237.

Lastly, it is urged that the verdict is contrary to law and not sustained by sufficient evidence. Counsel on this

question say that they "are not unmindful of the

3. well-established rules that when there is some material evidence, the court will not weigh the evidence; nor do we controvert the fact that four witnesses for plaintiffs, Ingle, Link, Collier and Hultz, testified to the emission of sparks of unusual sizes and quantities. * * * What we do contend for is that there is no proof whatever that the appellant was guilty of any negligence in the matter of equipment or repair of its engines, or that it was managed in any other way than the usual way of operating locomotive engines in doing the work of a common carrier of freight. All the evidence on that subject conclusively shows that the engine was equipped with a proper spark arrester; that it was properly installed, and that it was in good condition when it began the work of that day and when it finished the work on that day."

As pertinent to this admission and position taken by appellant's counsel, and to the evidence disclosed by the record, as well, we quote from the decisions of the Supreme Court: In the case of *Cincinnati, etc., R. Co. v. Smock* (1893), 133 Ind. 411, 33 N. E. 108, said court at page 416 said: "There was much evidence introduced on the trial of the cause tending to prove that, on the occasion in question, this engine threw an unusual quantity of sparks and coals of fire, and that such coals of fire were of an unusual size. From this evidence the jury could rightfully infer that the fire occurred by reason of the negligence of the appellant."

Again, in the case of *Toledo, etc., R. Co. v. Fenstermaker*

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(1904), 163 Ind. 534, 72 N. E. 561, the court said at page 537: "With respect to the first proposition it is contended by appellant that there was no evidence that the grass at either time was ignited by sparks from the locomotives. Courts have seldom gone so far as to hold it essential for a plaintiff to prove by direct and positive evidence that the fire complained of escaped from a locomotive. Such fires usually occur in broad daylight, when flying sparks are not plainly visible, and in many cases it would be manifestly unfair and unreasonable to give judgment against a plaintiff because he failed to produce a witness who saw the fire escape from the locomotive and fall upon the combustible matter. This and the other courts of the country generally have recognized the more just rule that where it is shown that there was no fire on the premises before, and no probable cause for the fire except the locomotive; that the wind was blowing from the road to the grass; and that the fire broke out soon after the engine passed—these things are circumstances sufficient to justify the conclusion that the fire was communicated by the train. *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.* (1899), 154 Ind. 322 [56 N. E. 766], and cases collected on page 333. Under the rule the evidence fully warrants the finding that the fires complained of were set by appellant's passing trains." See, also, *Cleveland, etc., R. Co. v. Hayes* (1906), 167 Ind. 454, 460, 79 N. E. 448; *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.*, *supra*; *Cincinnati, etc., R. Co. v. Smock*, *supra*; *Chicago, etc., R. Co. v. Ostrander* (1888), 116 Ind. 259-265, 15 N. E. 227, 19 N. E. 110; *Toledo, etc., R. Co. v. Sullivan* (1908), 41 Ind. App. 390-393, 83 N. E. 1024; *Pittsburgh, etc., R. Co. v. Wilson* (1904), 161 Ind. 701-704, 66 N. E. 899; *Chicago, etc., R. Co. v. Kreig* (1899), 22 Ind. App. 393-399, 53 N. E. 1033; *McDoel v. Gill* (1899), 23 Ind. App. 95, 53 N. E. 956; *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.* (1891), 27 Fla. 1 and 157, 9 South. 661, 17 L. R. A. 33 and 65.

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One of the witnesses testified concerning the engine in question, that (we quote from appellant's brief) "it threw smoke and cinders all over my team and scared the horses and I called for Shortridge to come out and help me hold them. It was in the neighborhood of 250 to 300 feet from the railroad. The cinders run from three-fourths to half an inch in diameter the smallest way. They fell in showers around my horses and on them. I called Shortridge out to hold them until I got my wood unloaded. There were black clouds of smoke."

A rural mail carrier testified to a similar condition of the sparks and cinders emitted from said engine, and to a similar effect had on the horse which he was unhitching from his buggy.

Numerous other witnesses testified to the size and quantities of the cinders and sparks. There was evidence also that fires were started along the right of way, both east and west of the station of Tunnelton, immediately after the passage of this engine on this particular trip.

The evidence is of a character that fully warranted the verdict of the jury under the law governing such cases as expressed in the decisions cited, and was sufficient, under the well-settled rules of this court, to prevent a reversal on this ground of the motion for a new trial.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 141. See, also, under (1) 38 Cyc. 1778; (2) 38 Cyc. 1711; (3) 33 Cyc. 1381. As to presumptions of negligence arising on proof of mismanagement in respect of the thing the accident is imputed to, see 20 Am. St. 490; 113 Am. St. 986. As to the validity of a law making communication of fire prima facie evidence of negligence, see 62 Am. St. 171. As to the presumption of negligence arising from the communication of fire by a railroad engine, see 1 Ann. Cas. 815; 16 Ann. Cas. 882; 15 L. R. A. 40. And for effect of presumption, from fact that fire was set by locomotive, to carry question of negligence to jury, see 5 L. R. A. (N. S.) 99. As to distance within which sparks from a properly equipped engine will set fire as a subject of expert testi-

mony, see 22 L. R. A. (N. S.) 1039. The authorities on the constitutionality of statute making railroad companies absolutely liable for damages by fire irrespective of negligence are reviewed in notes in 25 L. R. A. 161 and 35 L. R. A. (N. S.) 1016.

FIRST NATIONAL BANK OF WINSLOW v. STILWELL.

[No. 7,895. Filed April 18, 1912.]

1. JUDGMENT.—*Default.—Complaint to Set Aside.—Meritorious Defense.*—In a complaint by a married woman, under §405 Burns 1908, §396 R. S. 1881, to set aside a personal judgment taken by default against her in an action on a promissory note and to foreclose a mortgage to secure its payment, the averments that she executed the note and mortgage as surety for her husband, that she received no part of the consideration therefor and that no part thereof went to the betterment of her separate estate, show a meritorious defense that would have prevented the rendition of such judgment against her. p. 228.
2. JUDGMENT.—*Setting Aside.—Excusable Neglect.*—The term “excusable neglect” as used in §405 Burns 1908, §396 R. S. 1881, providing that a party may be relieved from a judgment taken against him through his excusable neglect, is one of general application, and a determination of what constitutes excusable neglect must depend on the particular facts and circumstances of each case. p. 231.
3. JUDGMENT.—*Default.—Complaint to Set Aside.—Sufficiency.—Excusable Neglect.*—Where a personal judgment had been taken by default against a married woman in an action on a note and to foreclose a mortgage to secure its payment, her complaint for relief therefrom under §405 Burns 1908, §396 R. S. 1881, alleging that she had no knowledge of signing the note for the reason that her signature had been obtained by the fraud of her husband, that she signed the mortgage as surety for her husband at his request, without reading it and without any knowledge that it contained a covenant requiring her to pay the sum secured thereby, that subsequently to its execution an attorney had examined the recorded mortgage at her request and advised her that she could not be held personally responsible thereon, that after summons was served she consulted another attorney and was by him advised that no judgment could be rendered against her in the foreclosure suit which could become a lien on her individual property, was sufficient to show excusable neglect in failing to defend in the foreclosure proceeding. p. 231.

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4. JUDGMENT.—*Application for Relief.—Excusable Neglect.—Sufficiency of Showing.—Rule.*—Where there is doubt as to the sufficiency of the showing of excusable neglect in an application for a relief from a judgment, it is better as a general rule to resolve the doubt in favor of the application. p. 232.
5. STATUTES.—*Opening and Vacating Judgments.—Construction.*—A statute providing for the opening or vacation of judgments is remedial in its nature and should be liberally construed. p. 232.
6. JUDGMENT.—*Default.—Setting Aside.—Discretion of Court.—Appeal.*—A trial court is vested with a certain discretion in setting aside defaults, and courts of appeal are reluctant to disturb its action where such relief has been granted. p. 232.
7. JUDGMENT.—*Setting Aside Default.—Appeal.—Review.*—The judgment setting aside a default will not be reversed where there is nothing disclosed by the record showing that the substantial rights of the appellant were prejudiced thereby. p. 233.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Alice Stilwell against the First National Bank of Winslow. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

E. A. Ely, and *Frank Ely*, for appellant.

J. W. Wilson and *J. W. Brumfield*, for appellee.

LAIRY, J.—On February 3, 1909, the First National Bank of Winslow, brought an action in the circuit court of Pike county, Indiana, against John W. Stilwell and Alice Stilwell, on a promissory note alleged to have been executed by them, and also to foreclose a certain mortgage to secure its payment. Notice by publication was given to John W. Stilwell, he being a nonresident of the State, and a summons was personally served on Alice Stilwell. Both of the defendants defaulted, and on May 1, 1909, a judgment for \$2,900.78 was rendered against them on the note, and also a decree entered foreclosing the mortgage as against both defendants, and ordering the mortgaged property to be sold to satisfy said judgment. The property covered by the mortgage was sold on the decree of foreclosure for the sum of \$1,900, leaving a balance of \$1,000.78 and accrued costs, which is a lien on the separate property of Alice Stilwell.

On July 15, 1909, Alice Stilwell filed in the Pike Circuit Court a complaint in two paragraphs against appellant, seeking, under the provisions of §405 Burns 1908, §396 R. S. 1881, to be relieved from the personal judgment entered against her on May 1, 1909, and asking that said default and judgment be set aside as to her, and that she be permitted to defend. Appellant filed a demurrer to each of said paragraphs of complaint for want of sufficient facts, which demurrer was sustained as to the second paragraph and overruled as to the first. Appellant filed an answer in general denial to the first paragraph, and a trial resulted in a finding and judgment in favor of appellee setting aside said judgment as to her and permitting her to defend. From this judgment this appeal is prosecuted, and the only error assigned is the action of the trial court in overruling appellant's demurrer to the first paragraph of complaint.

The averments of this paragraph of complaint show that appellant, a married woman, executed the note and mortgage on which the judgment in question was rendered,

1. as surety for her husband, John W. Stilwell, and that she received no part of the consideration, and that no part thereof went to the betterment of her separate estate. It thus appears that she had a good and meritorious defense which would have prevented the rendition of any personal judgment against her on the note or mortgage in case such defense had been interposed. This is not controverted, but it is claimed, on behalf of appellant, that the facts averred do not show that the judgment was taken against appellee through her mistake, inadvertence, surprise or excusable neglect, within the meaning of our statute permitting judgments to be set aside on such grounds.

As bearing on the question of mistake, inadvertence and excusable neglect, the complaint avers, in substance, that at the time of the execution of the mortgage in question appellee was the wife of John W. Stilwell, who was at that time president of appellant bank; that her husband had been

and was at the time of the execution of said mortgage extensively engaged in dealing in real estate, and that appellee, as his wife, had frequently signed written instruments at his request in the course of such dealings; that she fully trusted her husband, and when requested by him to sign any instrument she always complied with such request, and signed as directed; that the mortgage given to appellant was the first that appellant had executed in connection with her husband, and when it was presented to her for her signature she signed as she believed in two places as indicated by her husband; that she had no knowledge of signing the note which the mortgage was given to secure, and if she did sign it it was so folded in with the mortgage as to lead her to believe that her signature was affixed to the mortgage, and that she never knew that her signature was affixed to the note, or that she was personally liable thereon, until after the personal judgment against her was taken in favor of appellant; that her husband at that time was president of the First National Bank of Winslow, and that it was a part of his business to examine all securities presented to the bank for money, and pass upon the same; that said bank through its president had full knowledge of all of the facts relating to the manner in which her signature to said note had been obtained, and, with such knowledge, accepted the note and mortgage, and paid to her husband the entire proceeds thereof, for his own use and benefit; that after the execution of the mortgage, her husband, without her knowledge, deeded the mortgaged property to her, and then deserted her and went in company with another woman to a distant state.

The complaint further shows that after her husband had abandoned appellee, and before the suit was filed to foreclose the mortgage, she applied to an attorney, named in the complaint, for advice on the question of her personal liability on said mortgage; that said attorney examined the mortgage, and advised her that she was not personally liable

thereon; that after suit was brought and summons served on her she consulted another attorney, residing at Oakland City, as to whether she could be held personally on a mortgage executed by her husband in which she had joined, and whether any personal judgment could be rendered against her on such a mortgage which would become a lien on her individual property, and was informed that no such judgment could be taken against her.

The complaint further avers that at the time summons was served on appellee in the suit to foreclose the mortgage, she did not know that she had signed the note which it was given to secure, and believed that she was made a party solely because of the fact that she had signed the mortgage and was the owner of the land covered thereby; that she had no defense which she could make against the foreclosure, and that she relied on the advice given her by her attorneys to the effect that no personal judgment could be taken against her, and for that reason she did not appear to defend said suit, but suffered the judgment to go by default; that she was not informed until about July 1, 1909, that a personal judgment had been rendered against her on said note, and that she immediately thereafter employed attorneys to institute this proceeding.

The mortgage is set out as a part of the complaint, and it contains a personal covenant on the part of the mortgagors to pay the sum of money secured thereby, without relief from valuation or appraisement laws.

The demurrer admits the truth of all facts well pleaded, and we are called on to decide whether the facts alleged show such a case of mistake or excusable neglect as justified the trial court in the exercise of its discretion, in granting appellee relief by setting aside the judgment and permitting her to make her defense.

The term "excusable neglect" is one of very general application. No rule can be fixed by which to determine in

- all cases whether the neglect is excusable, or whether
2. the proper degree of diligence has been exercised.

Each case must depend on its own particular facts and circumstances, and can seldom serve as a precedent for another case depending on different facts. 1 Works' Practice §462; *Masten v. Indiana Car, etc., Co.* (1900), 25 Ind. App. 175, 181, 57 N. E. 148.

As disclosed by the facts pleaded, appellee had no knowledge at the time default was taken and judgment entered that she had incurred any personal liability on

3. either the note or mortgage. She did not know that she had signed the note, for the reason that her signature thereto was obtained by fraud, as stated in her complaint, and she did not know that the mortgage contained a covenant requiring her to pay the sum of money secured thereby, for the reason that she signed the mortgage at the request of her husband, without reading it. If she had been dealing with a person to whom she sustained no relation of trust and confidence, it might have been inexcusable neglect for her to sign the mortgage without reading it, but where the wife relies on the honesty and good faith of her husband, whose most sacred duty is to protect her and care for her interests, and is thereby misled, it ought not to be said that her failure to scrutinize a paper which she signs at his request constitutes such inexcusable neglect on her part as will preclude the court from granting relief. Her mistake was one of fact, and not of law. She had, in fact, signed the note, but she believed that she had not done so. The mortgage in fact contained a personal agreement on the part of the mortgagors to pay the debt secured thereby, but of this fact she was ignorant. If she had known that her name appeared on the note as a maker, or that the mortgage which she had signed contained her personal agreement to pay the debt thereby secured, and if she had been ignorant of her legal right under

such circumstances, or mistaken as to her remedy, such a mistake would have been one of law.

When appellee was served with summons in the foreclosure suit, she was not altogether indifferent. Prior to that time a lawyer had examined the recorded mortgage at her request, and had advised her that she could not be held personally responsible thereon. After the summons was served, she consulted another lawyer, and stated the facts as she understood them, and was again advised that no personal judgment could be rendered against her in the foreclosure suit which could become a lien on her individual property. It is true that she might have been more diligent at this time. If an attorney had been employed to appear for her, an examination of the complaint would have disclosed to him that a personal judgment against her could be rendered thereon in the absence of a defense on her part. However, in view of her misunderstanding of the facts, as disclosed by the averments of the complaint, we think there was some excuse for her failure to take this

precaution. This case is near the border line; but,

4. in case of doubt as to the sufficiency of the showing of excusable neglect, it is better, as a general rule, to resolve the doubt in favor of the application, and grant relief. *Watson v. San Francisco, etc., R. Co.* (1871), 41 Cal. 17; *Masten v. Indiana Car, etc., Co., supra*.

It is the policy of courts to dispose of cases on their merits, and a statute providing for the opening or

5. vacation of judgments, being remedial in its nature, should be liberally construed. The trial court held the complaint sufficient, and after a hearing set aside the judgment. Trial courts are vested with a certain

6. discretion in such cases, and an examination of the authorities shows that courts of appeal are very reluctant to disturb the action of the trial court in setting aside a default and permitting a trial on the merits. Elliott,

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Gen. Prac. §1032; *Winer v. Mast* (1896), 146 Ind. 177, 45 N. E. 66; *Masten v. Indiana Car, etc., Co., supra*.

There is nothing disclosed by the record to show that the substantial rights of appellant were in anyway prejudiced by the action of the trial court in setting

7. aside the default and permitting appellee to defend.

The application was seasonably made, and a trial on the merits would not be thereby unreasonably delayed. If on the trial appellee fails to establish her defense, appellant is not harmed. On the other hand, if such defense is established, it will not be deprived of any right to which it is entitled under the law. The trial court did not abuse its discretion.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 151. See, also, under (1) 23 Cyc. 949; (2, 3) 23 Cyc. 935; (4) 23 Cyc. 896; (5) 36 Cyc. 1173; (6, 7) 23 Cyc. 895. As to judgments by default against married women, see 134 Am. St. 940.

ATKINS v. KATTMAN.

[No. 7,486. Filed January 26, 1912. Rehearing denied April 18, 1912.]

1. PLEADING.—*Complaint.—Theory.*—To be sufficient, a pleading must proceed on a single definite theory and be good on that theory. p. 237.
2. PLEADING.—*Complaint.—Theory.—General and Specific Averments.*—The theory of a complaint will be ascertained only from its scope and tenor, and a general averment must yield to specific averments. p. 237.
3. DAMAGES. — *Complaint.—Averments.—Sufficiency.*—A pleading which fails to allege that the complaining party is damaged, and contains no averment of facts from which an inference of damages can be forced, is insufficient as a complaint for damages. p. 237.
4. PLEADING.—*Complaint.—Specific Performance.—Construction.*—Where a complaint was entitled a "Complaint for Specific Performance" and contained no allegation that the plaintiff was damaged, and demanded that defendant be required to perform

his contract, it will be construed as proceeding on the theory of an action for specific performance. p. 238.

5. SPECIFIC PERFORMANCE.—*Contract for Sale of Corporate Stock.*—*Complaint.*—*Allegements as to Performance.*—A complaint seeking to compel specific performance of a contract wherein plaintiff agreed to sell defendant certain corporate stock and release a claim that he held against the corporation, was insufficient for failure to allege that a tender of the stock was made to defendant before the action was brought, and is not cured by a general allegation of plaintiff's performance and willingness to perform. p. 238.

6. CONTRACTS.—*Contract by Correspondence.*—*Validity.*—*Meeting of Minds.*—Where defendant wrote to plaintiff that if he would give an option for ninety days on his stock, defendant would be willing to guarantee him \$300 for it with the understanding that the corporation's indebtedness to plaintiff would be transferred with the stock, and plaintiff replied that he would sell his stock for \$300 net to him, without commission, and that on completion of the sale and payment of the purchase price, he would release his claim against the corporation, plaintiff's reply was not an unconditional acceptance of defendant's proposition so as to constitute a meeting of the minds of the parties and there was no valid and enforceable contract between them. p. 239.

From Superior Court of Marion County (72,343); *Vinson Carter*, Judge.

Action by Harry E. Kattman against William A. Atkins. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Gavin, Gavin & Davis, for appellant.

Thomas D. McGee, Edward D. Reardon and *James H. Drew*, for appellee.

ADAMS, J.—It appears from the complaint in this action that plaintiff (appellee) was the owner of thirty-one shares of the capital stock of the Hoosier Gas Machine Company, an Indiana corporation, with its offices and place of business at Indianapolis, Indiana; that plaintiff also held a claim for \$325 against said company, for work and services performed by him; that defendant (appellant) was a large stockholder in said company, and was desirous of obtaining all the stock of said company, and getting the same under

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his sole control; that on March 13, 1906, defendant wrote to plaintiff, at El Paso, Texas, where he was temporarily residing, and after detailing the financial difficulties of the company, continued:

“I understand you have \$300 due you from the Company, besides your stockholding, and if we could reach a satisfactory understanding, I might be able to dispose of your stock, and at the same time clear the Company of the \$300 obligation to you. We will have all our stock machines sold, I expect, in sixty to ninety days, as we have five on hand at this time, and would say that if you will give me an option for ninety days on your stock, I would be willing to guarantee you \$300 for it, with the understanding that the indebtedness the Company owes you will be transferred with it.”

This letter was received by plaintiff, and answered on March 19, 1906, as follows:

“I am in receipt of your favor of the 13th, and note what you say in regard to your being willing to guarantee me \$300 for my stock, on condition that I give you a ninety days option on the same at that price, and further agree to release my claim against the Company for the amount it now owes me. I herewith enclose option and agreement to that effect. When you are in a position to close this matter, please advise me, and I will have stock certificates delivered to you.”

The enclosure referred to is as follows:

“I will sell my stock in The Hoosier Gas Machine Company of Indianapolis, Indiana, amounting to 31 shares, for the sum of \$300, net to me, without commission, and further agree upon completion of such sale, and payment of such purchase price, to me, to release all claims I may now have against said Company, amounting in the aggregate to about \$325; this option to expire ninety days from date.”

It is also averred in the complaint that the plaintiff within ninety days indorsed his certificates of stock in blank, and delivered them to George R. Brown, of Indianapolis, to be turned over to defendant, on the payment of \$300, and that plaintiff was notified within ninety days.

The complaint further states "that since the making of the defendant's offer, and its acceptance by this plaintiff, the affairs of said Hoosier Gas Machine Company, owing to causes of which the plaintiff is uninformed, became involved and its business decreased, and its stock declined in value, until it is now practically worthless. And the plaintiff further says that though said ninety day period has elapsed and though the plaintiff performed all and singular the conditions of said contract on his part to be performed, the said defendant, though often demanded to do so, has refused to pay and still refuses to pay the sum of \$300, and refused to perform the conditions of the said contract. And the plaintiff says that he has at all times, since the making of said contract, been willing and ready and desirous of performing the conditions of said contract incumbent on him, and is now ready and willing to perform all and singular the conditions of the said contract. Wherefore, the plaintiff prays that said defendant be required to perform said contract, and pay the plaintiff the sum of \$300, with interest thereon from the 13th day of June, 1906, and for such other relief as justice and equity may require."

The defendant demurred to the complaint for want of sufficient facts to constitute a cause of action against him. Demurrer was overruled, and the cause put at issue by an answer in denial. Trial by the court, and on request the court made a special finding of facts, and stated conclusions of law thereon. The first conclusion of law stated that plaintiff was not entitled to specific performance; and the third conclusion was that plaintiff was entitled to recover the sum of \$300 for the breach of the guarantee. Exception was taken to the overruling of the demurrer to the complaint, and to the second and third conclusions of law stated on the facts found, which constitute the errors assigned and relied on for reversal.

The important and controlling question presented by the record in this case relates to the sufficiency of the complaint

to state a cause of action. Preliminary to this, however, it is necessary to determine the theory of the complaint to ascertain what the action is for, and what relief is sought.

It is a familiar rule of law that requires a pleading

1. to proceed on a single definite theory, and to be good on that theory, if at all. *Kentucky, etc., Cement Co. v. Cleveland* (1892), 4 Ind. App. 171, 176, 30 N. E. 802.

The theory of a complaint will be ascertained only from its scope and tenor. A general averment must yield to specific averments, but the pleader is not at liberty

2. so to frame his pleading as to be open to different constructions, and then take his choice between them.

1 Hogate, Pl. and Pr. §337.

The complaint in the case before us is in a single paragraph, and is either on the theory of an action for specific performance of an alleged agreement, or for damages arising out of a failure to perform. It could not be for both. Combining in the same paragraph of a complaint a suit in equity for specific performance and an action at law for damages would be violative of the elementals of pleading.

We are not aided by the brief of appellee in resolving this question, for appellee argues both ways, with much plausibility, and is seemingly content to have this court determine the theory of his pleading. On the other hand, the appellant, with equal candor, but clearly within his rights, insists that the theory of the complaint is not controlling, as the complaint is bad on any theory.

We do not think the complaint states, or was intended to state, a cause of action for damages. It will be observed that it contains no allegation that plaintiff has been

3. damaged, and no demand is made for damages. An action for damages, without an allegation that the complaining party is damaged, would be clearly insufficient for obvious reasons. It is, however, averred in the complaint that after the acceptance of appellant's offer the business of the company decreased, and the value of the stock

declined until it was worth practically nothing. This averment does not state facts from which an inference of damages would be forced. A contrary inference would be more likely to arise. Assuming that the stock was not only practically worthless, but was wholly worthless, the company having assets only sufficient to pay its debts, appellee's claim would be worth its face, and he would not be damaged by failing to get \$300 for a claim worth \$350.

We think the theory of the complaint in this case is for specific performance. It is entitled "Complaint for Specific Performance", and the demand is that de-

4. fendant be required to perform his contract. In the court below the case was clearly tried on that theory, and in its conclusions of law the court stated that plaintiff was not entitled to specific performance of the contract. Does the complaint then state a cause of action for specific performance? Without giving the complaint a meaning which its words do not fairly import, and without ignoring the theory followed in the trial, this question must be answered in the negative. *Oölitic Stone Co. v. Ridge* (1908), 169 Ind. 639, 644, 83 N. E. 246, and cases cited.

We think the complaint as a complaint for specific performance is defective in several particulars. It is insufficient in that there is no averment that a tender of the

5. stock was made to appellant before bringing the action. As we have seen, an action for specific performance is an equitable proceeding, and before performance will be decreed, or a complaint therefor held good, it must appear that the complaining party, if he elects to treat the agreement as executed on his part, must aver full performance by himself and a refusal to perform by the other party, upon tender and demand being made, or a sufficient excuse shown for failure to make tender. In the absence of such averment, no right is shown for specific performance in favor of the vendor, or that the contract price shall be

the measure of damage. The general allegation of performance and willingness to perform will not supply the omission. *Newby v. Rogers* (1872), 40 Ind. 9, 12; *Dwiggins v. Clark* (1884), 94 Ind. 49, 56, 48 Am. Rep. 140; *Burke v. Mead* (1902), 159 Ind. 252, 263, 64 N. E. 880. To hold otherwise in this case would be to permit appellee to retain his stock, his claim against the company and his judgment against appellant.

In *Garr Scott & Co. v. Fleshman* (1906), 38 Ind. App. 490, 492, 77 N. E. 744, 78 N. E. 348, this court said: "It is established in this State that in all cases of contracts for the sale of personal property, when it has any market value, the vendor, before he can recover from the vendee the contract price, must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the title in him, if he had consented to accept it; for the law will not tolerate the palpable injustice of permitting the vendor to hold the property and also recover the price of it."

Again in *Shipp v. Atkinson* (1894), 8 Ind. App. 505, 507, 36 N. E. 375, this court said: "A repudiation of the contract by the purchaser relieves the seller from further compliance with the contract on his part so far as to enable him to maintain an action for damages for the breach of the contract, but in order to sustain an action for the contract price as upon an executed contract, he must, upon his part, comply entirely with the contract."

Another and vital question arising on the complaint is, Do the letters set out in the complaint show a contract of any kind? If there was a contract, there must have

6. been a meeting of the minds of the parties; there must have been an absolute proposition submitted by one, and an unconditional acceptance by the other. Whether there was such a proposition and such an acceptance must be determined from the letters. Appellant wrote to ap-

pellee: "If you will give me an option for ninety days on your stock, I would be willing to guarantee you \$300 for it, with the understanding that the indebtedness the Company owes you will be transferred with it." Appellee replied: "I will sell my stock * * * for the sum of \$300, net to me, without commission, and further agree upon completion of such sale, and payment of such purchase price, to me, to release all claims I may now have against said Company, amounting in the aggregate to about \$325; this option to expire ninety days from date."

An examination of the letters will disclose that the proposition of appellant was not unconditionally accepted, but a counter-proposition was made by appellee. Appellant, for a ninety days' option on the stock, agreed to guarantee \$300, with the understanding that appellee's claim should be transferred with it. Appellee offered a ninety days' option from the date of his letter, to sell his stock for \$300 net, and on payment, to release his claim against the company. In the proposition of appellant, the claim was to be transferred with the stock; in appellee's proposition, it was to be released after the purchase price of the stock had been received.

In the case of *Cartmel v. Newton* (1881), 79 Ind. 1, 8, Judge Elliott, speaking for the court, said: "A modified acceptance of a proposition cannot make a valid contract. The appellant was entitled to have his proposition accepted as he made it. A proposition is either accepted or rejected, and a modification is a rejection. Of course, the parties may subsequently agree upon a modification of the original proposition; but until the person who makes the proposition assents to the modifications asked by the party to whom the proposition is made, there is no contract. Until then there is no meeting of the minds, which is always indispensably essential."

Measured by the rule here announced, there was no valid and enforceable contract between the parties.

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The judgment is reversed, with instructions to the lower court to sustain the demurrer to the complaint.

NOTE.—Reported in 97 N. E. 174. See, also, under (1, 4) 31 Cyc. 84, 85; (2) 31 Cyc. 85; (3) 13 Cyc. 174; (5) 36 Cyc. 779; (6) 9 Cyc. 267. As to the essential elements of a bill to enforce an agreement for the sale of stock, see 135 Am. St. 700.

JENNINGS v. SOUTH WHITLEY HOOP COMPANY.

[No. 7,546. Filed April 19, 1912.]

1. **APPEAL.—Review.—Findings.—Conclusiveness.**—Where there is some evidence to support the findings of the trial court, they will not be disturbed on appeal. p. 248.
2. **ACCORD AND SATISFACTION.—Burden of Proof.**—Where defendant pleads accord and satisfaction, he has the burden of proving same. p. 248.
3. **ACCORD AND SATISFACTION.—Establishment.—Authority of Attorney.**—Where defendant, operating a wholesale business in one city under the name of C. Company and in another under the name of L. Company, had purchased supplies from plaintiff with names of the two companies, in an action to recover a balance due, evidence showing that plaintiff had placed in the hands of an attorney an account against the C. Company, that the attorney had no knowledge of the L. Company nor of any transactions had between it and the plaintiff, and that defendant gave to such attorney his check for the amount of the claim against the C. Company, with a statement attached thereto that it was to be accepted in full payment of all obligations of the plaintiff against the C. Company and the L. Company, and that the attorney detached the statement and cashed the check, was insufficient to establish an accord and satisfaction of the claim sued on in the absence of evidence showing special authority in the attorney. p. 248.
4. **ATTORNEY AND CLIENT.—Authority of Attorney.—Collection of Claims.—Compromise.—Rights of Client.**—Except in cases of emergency where the interest of the client may be jeopardized if action be deferred, or when specially authorized so to do, an attorney has no authority to compromise a claim placed in his hands for collection, and, where he does so, the client is at liberty to ignore the same and treat such action as a nullity. p. 249.

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5. **ATTORNEY AND CLIENT.**—*Unauthorized Compromise.*—*Ratification by Client.*—Where an attorney, without authority to do so, effected an alleged compromise of plaintiff's claim, the fact that plaintiff delayed bringing an action until nineteen days thereafter was not such acquiescence as would amount to a ratification of the attorney's act. p. 249.
6. **PLEADING.**—*Verification.*—*Execution of Instruments.*—*Failure to Deny Under Oath.*—*Effect.*—Failure to deny the execution of an instrument under oath is a waiver of preliminary proof of its execution before being offered in evidence, but does not preclude the introduction of evidence as to the consideration therefor, the situation of the parties and the circumstances of its execution, for the purpose of showing the real intention of the parties. p. 250.
7. **ACCORD AND SATISFACTION.**—*Establishment.*—Where an agreement is relied on as an accord and satisfaction, the agreement and its execution must be established as a question of fact like any other agreement. p. 250.

From Superior Court of Madison County; *H. Clarence Austill*, Judge.

Action by South Whitley Hoop Company against Harry E. Jennings. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Forkner & Forkner, for appellant.

Kittinger & Diven, Gates & Whiteleather, for appellee.

MYERS, J.—Appellee brought this action against appellant to recover payment for a carload of heading sold and delivered by the former to the latter.

A complaint in one paragraph, answer in four paragraphs: (1) general denial; (2) payment; (3) accord and satisfaction; (4) that appellant purchased from appellee a carload of hoops which he paid for in cash; that they were shipped to one of appellant's customers, who refused to receive them on account of defective quality, whereupon appellee ordered them shipped to another point, and received them back, by reason of which appellee was indebted to appellant, which indebtedness he asked to have set off against any amount found due on account of the demand in suit;

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and a reply in general denial to the second, third and fourth paragraphs of answer, formed the issues. Trial by the court, special findings of facts made and conclusions of law stated thereon, and final judgment in favor of appellee.

The questions presented are covered by the assignment of errors based on the exception to the conclusion of law, and on the overruling of the motion for a new trial.

From the findings it appears that during the time covered by the various transactions between appellant and appellee, the former was engaged as a wholesale dealer and jobber in barrel staves, heading and hoops, under the name of Lawrenceburg Barrel Company, of Lawrenceburg, Indiana, and Central States Cooperage Company, of New Castle, Indiana, and was the sole owner of both concerns. On March 5, 1908, appellant, in the name of Central States Cooperage Company ordered from appellee a car of hoops shipped to the Coöperative Flint Glass Company, of Beaver Falls, Pennsylvania, the bill therefor amounting to \$583.25, which was subject to a discount of one per cent. if paid within ten days from date of invoice. The glass company received and unloaded the hoops, and after using 3,750 of one kind, and 12,850 of another, reloaded the remainder in a car, and shipped them on appellant's order, in disobedience of appellee's order, to the Warren Cooperage Company, of Warren, Ohio. On April 4, appellant, in the name of Central States Cooperage Company purchased from appellee hoops amounting to \$612. On May 20 appellant ordered from appellee, in the name of the Lawrenceburg Barrel Company, heading amounting to \$701.40. In June, 1908, appellee placed in the hands of Brown & Beard, attorneys at New Castle, Indiana, a claim for \$617.84, against appellant, contracted in the name of the Central States Cooperage Company, debit and credit items making up the claim as follows:

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DEBIT		CREDIT
March 13th, Car No. 26,493 (cov- ering order of March 5, 1908). \$583 25		March 21, check to apply on car No. 26,493, (be- ing payment on order of March 5) \$571 58
April 4, Car No. 7326 (covering order of April 4, 1908) 612 00		March 21, 1% dis- count on order of March 5 5 83
Total debit ..\$1,195 25		Total credit .. \$577 41
	577 41	
Balance due June 8/08 \$617 84		

At the time said claim was placed in the hands of said attorneys, appellee did not know that appellant was the sole owner of the Lawrenceburg Barrel Company, and Central States Cooperage Company, or that either company bore any relation to the other, nor did said attorneys know at that time, or at the time it was presented for payment, that appellant was financially interested in either of said companies. Said claim was the only one these attorneys ever had against appellant or either of said companies, for collection, in favor of appellee; that the items of said account were read over to appellant before he paid the same, and it and no other was paid by him to the attorneys; that said attorneys received a check from appellant for \$617.84, and through a misapprehension, misunderstanding and mistake, receipted appellant "In full payment of all obligations against the Central States Cooperage Company and Lawrenceburg Barrel Company, on account of South Whitley Hoop Company." The payment made by appellant on March 21 of \$577.41, and the payment of \$617.84 to the attorneys fully paid the orders of March 5 and April 4; that the order given May 20, amounting to \$701.40, has never been paid, and the same was due July 20, 1908, and from that time to the date of the trial there was due as

interest \$39.17. On the facts found the court concluded the law to be with appellee.

The conclusion of law is unquestionably supported by the facts specially found. This proposition is not, and cannot be seriously controverted, hence we look to the causes assigned and relied on by appellant for a new trial, namely, the decision of the court is not sustained by sufficient evidence, and is contrary to law.

Under these assignments two questions only are discussed: (1) Was appellant, as against the claim sued on, entitled to a credit of \$571.28, paid by him on account of the Beaver Falls car? (2) Was there an accord and satisfaction between the parties of all claims and accounts between them which was settled and paid? These questions relate to the disposition of the issues formed by the general denial to the third and fourth paragraphs of answer.

The third paragraph was founded on a check for \$617.84, drawn by the Central States Cooperage Company to Brown & Beard, attorneys, and attached thereto was the statement "to be accepted in full payment of all obligations against Central States Cooperage Company and Lawrenceburg Barrel Company, on account of South Whitley Hoop Company." The check was indorsed "Brown & Beard, Attys. for South Whitley Hoop Company." The check was detached and cashed by said attorneys at the bank on which it was drawn in New Castle, Indiana. These facts and others are pleaded as an accord and satisfaction of the claim sued on.

The evidence in this case involved three orders given by appellant to appellee for cooperage material. The first two were given in the name of Central States Cooperage Company, New Castle, Indiana. Appellee claims that the balance due on account of these orders only was paid to Brown & Beard, attorneys, July 2. The other order, which gave rise to the account in suit, was given in the name of Lawrenceburg Barrel Company, Lawrenceburg, Indiana, and ap-

pellant insists that it also was compromised and paid by the check given to said attorneys July 2.

It appears that appellant was doing business under these two company names. The first of said orders, given to appellee, was dated March 5, 1908, for a carload of hoops for the Coöperative Flint Glass Company, Beaver Falls, Pennsylvania, and to which we will hereafter refer as the Beaver Falls car. This car was shipped by appellee March 13, and arrived at Beaver Falls March 20 or 21. The consignee immediately unloaded the car, placed the hoops in its stock shed, and at once began using them. Fourteen days after the car had been unloaded, and 16,000 to 17,000 hoops used, the glass company informed appellant that these hoops were of inferior quality, and that they would not accept them at the price charged. Appellant immediately took this matter up with appellee, and a number of letters and telegrams with reference thereto were sent by one to the other during the months of April, May and June. In May, after appellee had notified appellant that it would not receive the car back, that the glass company had unloaded it; that the coils had been broken apart and the hoops generally mixed up, and that it would expect payment for the hoops, the glass company, on appellant's order, reloaded the balance of the hoops May 26, and shipped them to the Warren Cooperage Company, Warren, Ohio. On May 29 appellant notified appellee that the hoops had been shipped, and enclosed to it the bill of lading for the car. Appellee immediately notified the Warren Cooperage Company as follows: "Do not accept car hoops billed to you from Beaver Falls," and also notified appellant of this action. On June 27 appellant wrote appellee as follows: "We are ready to settle with you on the car of stock shipped to the Lawrenceburg Barrel Company, also to ourselves (Ashland Car). There being a balance due of \$675.40." Then follows a statement showing the amount due on account of the Ashland car, and the Lawrenceburg car, in which statement appellant took credit for the check given on ac-

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count of Beaver Falls car, \$571.28, which together with other small credits left a balance due as stated. On April 14 appellant furnished appellee a statement on account of the Lawrenceburg car, claiming a loss on account of the quality of the heading and hoops amounting to \$30.60, which appears to have been allowed by appellee, and on June 5 another statement on account of Beaver Falls car, claiming a credit of \$606.40; and on the same day another statement claiming an allowance on account of quality of the hoops and heading, Lawrenceburg car of \$31.60, and for \$571.28 account Beaver Falls car, and other small items, showing a balance due appellant of \$26. It further appears from the evidence that about July 1, 1908, the firm of Brown & Beard, attorneys, received for collection against appellant the account set out in the special findings. There is evidence tending to prove that said attorneys, over the telephone, read the items to appellant constituting that account. On July 2 appellant gave said attorneys the following paper:

“Central States Cooperage Co. No. 948
New Castle, Ind., 7-2-1908

INDIANA Pay to the
order of BROWN & BEARD, Attys., - \$617.84
Six hundred seventeen - - 84-100 Dollars
To the Citizens State Bank Central States
New Castle, Ind. Cooperage Co.
By H. E. Jennings.

Above check is in settlement of invoices as listed and endorsement of same by payee is acknowledgment of such payment.
Detach check before depositing.
CENTRAL STATES COOPERAGE COMPANY.
Form N. 85. No receipt is desired.

INVOICE.

Number	Date	Memo.	Account of Deductions	Net
			invoice—	Remittances
			Discount Fra	Other items

To be accepted in full payment of all obligations against Central States Cooperage Co., and Lawrenceburg Barrel Co., account South Whitley Hoop Co.”

The attorneys detached the check, presented it to the bank, and it was paid in full on the day received by them. Both of these attorneys, in substance, testified that they received the account for collection in the usual course of business; that they had no other account in their hands against appellant; that they did not know anything about the order given in the name of the Lawrenceburg Barrel Company; that they were not advised as to any controversy theretofore had between appellant and appellee; that they accepted the above-mentioned check, indorsed it, that it was paid, and that they remitted in due course.

We have only attempted to give a general statement of the evidence disclosed by the record before us. It is enough to show that there was a dispute between appellant and appellee as to the amount due from the former to the latter at the time the check was given to the attorneys, and that this disagreement was solely on account of the Beaver Falls transaction. For this court to determine the fact,

1. whether or not the Glass Company had accepted that car, would require us to weigh the evidence, and this we cannot do. There was evidence tending to prove that the Beaver Falls car was not returned to nor received by appellee, that it was received and accepted by the Glass Company, and the amount due on that account or the question of appellant's liability in that behalf under all the evidence was for the trial court, and its finding on the issue presented by the fourth paragraph, this court cannot disturb.

The burden was on appellant to prove the accord and satisfaction averred in its third paragraph of answer. The transaction relied on by appellant was had with the at-

2. torneys of appellee. The account which they had for collection was open to his inspection. There is no evidence tending to show that they had any special authority from their client or that they knew the facts and
3. circumstances connected with the Beaver Falls car. For aught that appears, Brown & Beard had no au-

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thority from appellee except that which naturally grew out of an employment to collect the particular claim placed in their hands.

Appellant, under the evidence here disclosed, was bound to know that the attorneys with whom he was dealing had no general authority to compromise a claim put in their hands for collection by receiving a sum less than its face value, or in that connection to compromise other demands between him and their client, of which they had no knowledge. It was their duty to collect the account placed in their hands, and there it ended.

As said in the case of *Repp v. Wiles* (1891), 3 Ind. App. 167, 29 N. E. 441: "It is only in cases of emergency where

the interests of the client reasonably appear to be in

4. jeopardy if action be deferred that an attorney is justified in departing from his usual and general line of duty. * * * If the attorney has time to communicate the situation to the client without hazarding a loss, he must do so." See, also, *Union Mutual Life Ins. Co. v. Buchanan* (1885), 100 Ind. 63.

It does not appear that appellee ever saw or knew the contents of the paper composing the check and other memoranda which appellant gave to the attorneys, and there is no evidence indicating that a delay on the part of the attorneys to act would in the least jeopardize their client's interest. It seems to us, under the evidence in this case, the attorneys were without any authority from their client to make any compromise, and if they did, their client was at liberty to ignore the same and treat such action as a nullity. *Jones v. Inness* (1884), 32 Kan. 177, 4 Pac. 95; *Rousaville v. Hazen* (1885), 33 Kan. 71, 5 Pac. 422; *Solomon R. Co. v. Jones* (1885), 34 Kan. 443, 458, 8 Pac. 730; *Sharpe v. Williams* (1889), 41 Kan. 56, 20 Pac. 497; 4 Cyc. 945.

This action was commenced July 21, 1908, there-

5. fore it cannot be said that appellee acquiesced in the alleged compromise for such a length of time as would

amount to a ratification of what was done by the attorneys July 2.

The contention of appellant is, that appellee's failure to deny under oath the execution of what he designates a receipt given by Brown & Beard by reason of their indorsement of the check, amounted to an admission of the authority of the attorneys to execute it, and the introduction in evidence of the check and the statement or receipt accompanying the same, was conclusive proof of the accord and satisfaction as averred in the third paragraph of answer.

The failure to deny under oath the indorsement or execution of the check and receipt amounted to a waiver of preliminary proof of their execution before being offered

6. in evidence, but such failure would not preclude the introduction of evidence tending to show the consideration for the check, the business in which the parties were engaged, and the circumstances under which the check was given and indorsed, not for the purpose of changing or contradicting the instrument thus executed, but for the purpose of showing what was the real intention of the parties.

The alleged agreement and its execution of July 2 is relied on by appellant as an accord and satisfaction, and is to be established as a question of fact like any other

7. agreement. As there was evidence before the trial court justifying the finding that the transaction of July 2 did not amount to an accord and satisfaction, its conclusion in that regard must stand.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 194. See, also, under (1) 3 Cyc. 360; (2, 3) 1 Cyc. 348; (5) 4 Cyc. 951, 952; (6) 31 Cyc. 529, 530; (7) 1 Cyc. 348. As to the right of an attorney to make a compromise of his client's cause of action, see 21 Ann. Cas. 577. As to the validity of an accord and satisfaction by an attorney, see 100 Am. St. 403. On the question of attorney's loss of compensation by compromising case without authority, see 42 L. R. A. (N. S.) 852. As to implied power of attorney to compromise cause of action, see 31 L. R. A. (N. S.) 523.

MOON v. SCHOOL CITY OF SOUTH BEND.

[No. 7,879. Filed April 19, 1912.]

1. SCHOOLS AND SCHOOL DISTRICTS.—*Contract by Board of School Trustees.—Employment of Superintendent.—Term of Employment.—Validity.*—Under §6488 Burns 1908, §4445 R. S. 1881, giving the school trustees of an incorporated town or city authority to employ a superintendent for their schools, the term of the employment is left to the sound discretion of the school trustees, and, in the absence of a showing of fraud or an abuse of such discretion, a contract employing a superintendent of city schools for a term of three years was valid, although it extended beyond the term of any member of the board as composed at the time the contract was made. pp. 252, 256.
2. CONTRACTS.—*Validity.—Public Policy.*—Courts cannot arbitrarily declare a contract void as against public policy, and, where the power to make the contract is given by statute, the reasons for declaring it void should clearly appear before the court is warranted in so deciding. p. 256.
3. CONTRACTS.—*Validity.—Public Policy.—Manner of Determining Question of Public Policy.*—In determining whether a contract is contrary to public policy the courts will look first to legislative declarations on the subject, if any, and secondly to their judicial interpretation. p. 256.
4. SCHOOLS AND SCHOOL DISTRICTS.—*Contract by School Trustees.—Employment of Superintendent.—Validity.—Public Policy.*—Where the trustees of a school city made a contract employing a superintendent for a term of three years, the bare possibility of abuse of their power neither justifies a denial of authority to make such contract nor shows the same to be against public policy. p. 257.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Calvin Moon against the School City of South Bend. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Anderson, Parker & Crabill and *S. J. Crumpacker*, for appellant.

Harry R. Wair, for appellee.

FELT, C. J.—Appellant brought this action to recover damages for an alleged breach of a written contract. A

demurrer was sustained to his complaint, and appellant assigns error in such ruling.

The complaint alleges that on March 17, 1908, plaintiff and defendant, by its then board of school trustees, entered into a written contract, by which plaintiff agreed to serve defendant in the capacity of superintendent of the public schools, and to give his whole time and attention to the superintendency of said schools for a period of three years, beginning September 5, 1908, and ending September 5, 1911; that in consideration of said services to be performed by plaintiff, defendant agreed to pay him a salary of \$2,600 per year during said term of three years; that on said September 5, 1908, plaintiff entered on the performance of his duties under said contract, and continued in the performance of such services, and devoted his whole time and attention thereto until August 17, 1909, and has ever since been ready, able and willing to continue in the performance of all of his duties and services under said contract; that on said August 17, 1909, defendant, through its then board of trustees, without reasonable or just cause, and over plaintiff's protest and against his will, discharged him from his position of superintendent of the public schools, and then and thereafter refused to permit him to discharge and perform the services and duties required of him by said contract.

A copy of the contract is filed with the complaint as an exhibit.

Appellee asserts that the complaint is bad because (1) the contract is against public policy, and (2) the board was without statutory authority to make it.

The statute (§6488 Burns 1908, §4445 R. S. 1881), provides: "The school trustees of incorporated towns and cities shall have power to employ a superintendent for
1. their schools * * * and to prescribe his duties, and to direct in the discharge of the same." The statute clearly empowers the board to employ a superintendent, and the contract is valid unless vitiated by the length

of the term of employment. The two objections are therefore practically reduced to one. Under the statute, the school board consisted of three members, each of whose term of office is three years, and the term of one expires on August 1 of each year. §6477 Burns 1908, Acts 1905 p. 437, §§6491, 6492 Burns 1908, Acts 1903 p. 417, §§1, 2.

Of the members of the board when the contract was entered into, the term of office of the one having the longest time to serve would expire on August 1, 1910, and the contract would terminate on September 5, 1911. If such contract is against public policy, the ruling of the trial court on the demurrer was right, if not, it was erroneous.

Section 9780 Burns 1908, §6090 R. S. 1881, authorizes the board of county commissioners to employ a superintendent of the county asylum, "to take charge of the same, upon such terms and under such restrictions as the board shall consider most advantageous for the interests of the county." While the phraseology of this statute differs from the one now under consideration, their meaning and general import, when applied to the subject-matter of each, are very similar.

The latter statute was considered in *Board, etc., v. Shields* (1891), 130 Ind. 6, 29 N. E. 385, with reference to the employment of a superintendent for a county asylum for a term of five years. In that case as in this it was alleged that the superintendent was discharged by the board "without any cause", after a change of its personnel, and after said superintendent had served a considerable portion of his term. The objections there urged are identical with those presented to sustain the ruling of the trial court in this case. The court held that the contract was not against public policy, and said: "The power thus conferred upon boards of county commissioners to employ and contract with a superintendent, in the absence of any restriction contained in the statute, of necessity carries with it the power to fix some term of service or time of duration of such employment. It was undoubtedly competent for the legislature to

place any restrictions they might see fit on the board in the employment of a superintendent, and provide that no contract of employment should be for longer than a given time, or even to forbid making a contract of employment for any certain and definite term. They have, however, not seen fit to do so. It must not be understood that there are no bounds to the discretion thus granted. We do not wish to be understood as holding that their action in the making of such contracts is not subject to review, and that a contract would not be annulled if it was shown that the board had abused its discretion in making it, but we do hold that unless it appears that there has been a clear abuse of discretion, and no fraud is shown, the courts will not interfere. It is insisted, however, that this contract is void upon other grounds, that it is in contravention of public policy, for the reason that to uphold it would put it in the power of one board of commissioners to bind the hands of its successors, and that it operates as an unwarranted abridgment of the 'administrative, executive and legislative' powers of the board. The first of the reasons assigned rests upon an erroneous conception of the constitution of the board of county commissioners that that body consists of a series or succession of boards, one following the other. As we have heretofore said, the board of commissioners is a corporation, representing the county. From a legal standpoint it is the county, as is said in *State, ex rel., v. Clark* [(1853), 4 Ind. 315], *supra*. It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is, that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason. As individuals they are not parties to it."

In *Reubelt v. School Town of Noblesville* (1886), 106 Ind.

478, 7 N. E. 206, it was decided that the employment of a school superintendent in May, prior to the election of a new member of the board in June, for the school year beginning in September following, was valid and binding on the school corporation. The court quoted the statute here under consideration, and said: "The authority of the board of school trustees to employ teachers, and a superintendent of the schools in the town or city, is given in general terms, just as the authority to make other contracts is given. * * * It may be that instances will occur when the authority to employ teachers and superintendents in advance of the incoming of a new member of the board may be abused, but the possibility is not very great, as but one member goes out at a time. But the fact that the authority may be abused, is not a sufficient reason for holding that it does not exist. On the other hand, desirable teachers and superintendents might be lost to the schools, if the board were not authorized to employ them until after the election in June."

Appellee relies mainly on *Board, etc., v. Taylor* (1890), 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160. In that case the contract of the board of commissioners with certain attorneys to serve the board for a term of three years was held invalid as being against public policy and for the reason that the members of the board did not have power to bind their successors in office by such contract. This case was discussed in *Board, etc., v. Shields, supra*, and held not to be controlling in that case, and among the reasons given for so holding it was said: "The relations existing between an attorney and his client are unlike those ordinarily existing between employer and employe. They are of an intimate and confidential character. The attorney, instead of acting under the direction and instruction of his client, is himself largely the adviser and instructor. One of the principal duties imposed upon him by his employment is to advise as to the law. There is, therefore, much reason in holding that the board, as personally constituted, should be at all times

free to select its own confidential legal adviser.” If the Taylor case was not controlling in the Shields case, it is not in the one at bar.

Counsel for appellee also refer to the act of 1893 (Acts 1893 p. 34, §6593 Burns 1908) making it unlawful for a township trustee to hire a teacher whose services under such employment do not begin before the expiration of the term of office of the trustee, and insists that this statute indicates the policy in such matters, and tends to show that the contract in the case at bar is against public policy.

The fact that the act is limited to township trustees is, however, significant in view of the general and growing custom in the larger cities of this State to employ school superintendents for a term of years. The statute governing the employment in this case confers the power without limitation, and the later act, limited as it is, in so far as it has any effect on the question of public policy, tends to indicate a different policy in relation to city school superintendents, or at least in a negative sense evidences the legislative intention to leave undisturbed the power conferred by the statute we are considering.

Courts cannot arbitrarily declare a contract void on the theory that it is against public policy. Where the power to

- make the contract is given by statute, the reasons for
2. so declaring it void should clearly appear before the court is warranted in so deciding. In determining the question of public policy, the courts look first to legislative declarations, if any, and secondly, to judicial interpretation, where available. *Picket Publishing Co. v. Board, etc.* (1907), 36 Mont. 188, 92 Pac. 524, 122 Am. St. 352, 357, 13 L. R. A. (N. S.) 1115, 12 Ann. Cas. 986.

In so far as our legislature has indicated any policy,

1. it is to leave the term of the employment of city school superintendents to the sound discretion and judgment of the school trustees.

Other cases in our own State tend to sustain the view that

the contract in question is not against public policy nor wanting in statutory authority. *School Town of Milford v. Zeigler* (1891), 1 Ind. App. 138, 27 N. E. 122; *Jackson School Township v. Shera* (1893), 8 Ind. App. 330, 35 N. E. 842; *Hornbeck v. State, ex rel.*, (1904), 33 Ind. App. 609, 71 N. E. 916.

The decided weight of authority outside our own State is to the effect that such contracts are not against public policy. Cases to the contrary are generally distinguishable by the different provisions of the statute considered. *Gates v. School Dist., etc.* (1890), 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186; *Picket Publishing Co. v. Board, etc., supra*; *Taylor v. School Dist., etc.* (1897), 16 Wash. 365, 47 Pac. 758; *Caldwell v. School Dist., etc.* (1893), 55 Fed. 372; *Ward v. Board, etc.* (1905), 138 Fed. 372, 70 C. C. A. 512; *Wait v. Ray* (1876), 67 N. Y. 36; *Farrell v. School Dist., etc.* (1893), 98 Mich. 43, 56 N. W. 1053; *Chittenden v. School Dist., etc.* (1884), 56 Vt. 551; *Wilson v. East Bridgeport School Dist., etc.* (1869), 36 Conn. 280.

In *Wait v. Ray, supra*, it was said with reference to a statute similar to ours: "This power is general and unlimited. If it had been intended that the contracts which they are authorized to make should not extend beyond their term of office, this general language would have been limited."

In *Caldwell v. School Dist., etc., supra*, it was said, in substance, that where the term of such employment is not limited by statute, no principle of public policy prohibits the making of a contract similar to the one before us.

Any fact or circumstance that would indicate an abuse of discretion on the part of the board, unfair dealing, fraud or collusion for the purpose of doing something detrimental to the interests of the schools, might be used effectively in a

- proper case to terminate an employment; but the possibility of abuse, as stated in several of the cases already cited, does not give a sufficient reason for deny-

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ing the authority to make such contract under a statute conferring the power so to do, without limitation, nor does it show that such contracts are against public policy.

For reasons already stated, we conclude that the trial court erred in sustaining the demurrer to appellant's complaint.

The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 98 N. E. 153. See, also, under (1) 35 Cyc. 1079; (2, 3) 9 Cyc. 482; (4) 9 Cyc. 482; 35 Cyc. 1079. As to contracts against public policy, see 93 Am. St. 905. The authorities on the power of a board to appoint superintendents or teachers for terms extending beyond its own term are discussed in a note in 29 L. R. A. (N. S.) 657.

MYERS v. WINONA INTERURBAN RAILWAY COMPANY.

[No. 8,209. Filed April 19, 1912.]

1. **TIME.—Computation.—Exclusion of Sunday.—Time for Filing Briefs.**—The provisions of §1350 Burns 1908, §1280 R. S. 1881, for computing the time within which an act is to be done and providing that if the last day be Sunday, it shall be excluded, apply to the time for filing briefs. p. 259.
2. **TIME.—Computation.—“To.”—“Till.”—“Until.”**—When the word “to” is used as a conjunction, it is synonymous with “till” or “until,” and where the time for doing a thing is “to” a certain day such day is not included. p. 259.
3. **APPEAL.—Briefs.—Time for Filing.—Dismissal.**—Where appellant procured an extension of time for filing briefs to March 3, the filing of such briefs after March 2 was not in time, and authorized a dismissal of the appeal. p. 260.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Edward A. Myers against The Winona Interurban Railway Company. From a judgment for defendant, the plaintiff appeals. *Dismissed.*

Cox & Andrews, Mountz & Brinkerhoff, for appellant.

Loveland & Sollitt, Frazer & Frazer, for appellee.

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ADAMS, J.—A motion to dismiss this appeal has been filed by appellee, on the ground that appellant did not file his brief within the time fixed by the court. The record shows that this cause was submitted on December 14, 1911, and the sixty days allowed for filing appellant's brief expired February 11, 1912. On February 6, 1912, appellant filed his petition asking that he be given twenty days additional time for filing said brief. The petition was granted, and the court noted thereon "Time extended to March 3rd, 1912."

The brief was filed with the clerk of this court on 1. March 4, 1912. March 3 was Sunday, and under the statute (§1350 Burns 1908, §1280 R. S. 1881) for computing time within which an act is to be done, it is provided that if the last day be Sunday it shall be excluded. This statute has been held to apply to the time for filing briefs. *Hogue v. McClintock* (1881), 76 Ind. 205.

But we do not think that the statute necessarily applies to the question presented by the motion before us.

2. It will be observed that the time for filing appellant's brief was extended "to" March 3.

In *Garden City v. Merchants, etc., Bank* (1899), 8 Kan. App. 785, 60 Pac. 823, it was held that where time was extended to March 22, the time given expires at midnight on March 21. The court said: "While it cannot be said that 'to' has any settled legal meaning, it is generally defined to be a word of exclusion, unless, by necessary implication, it must be held to be used in an inclusive sense. We think that in the connection in which it is used in the order, it has the same meaning as 'till' or 'until.'" 8 Words and Phrases 6985.

In *People, ex rel., v. Robertson* (1862), 39 Barb. 9, it was held that a lease given to May 1 would expire on April 30, at 12 o'clock midnight.

When the word "to" is used as a conjunction, it is synonymous with "till" or "until." Century Dictionary.

Time until a day named does not include that day. *Eshel-*

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man v. Snyder (1882), 82 Ind. 498; *Erb v. Moak* (1881), 78 Ind. 569.

In *DeHaven v. DeHaven* (1874), 46 Ind. 296, it was held that where time was given till the next term of court in which to file the bill of exceptions, the time given did not include the time during the next term nor any part of it. See, also, *Corbin v. Ketcham* (1882), 87 Ind. 138.

Where time has been given until a day named to file a bill of exceptions, the day named is not within the time fixed for the filing. *Hartman v. Riggerberg* (1889), 119 Ind. 72, 76, 21 N. E. 464.

“In the case of *Newby v. Rogers* [1872] 40 Ind. 9, it is held that where a party has from a certain day to a certain other day to perform the act, both such days are excluded.” *Cheek v. Preston* (1905), 34 Ind. App. 343, 345, 72 N. E. 1048.

In this case the fact that March 3 was Sunday is not important, as it is clear, under our decisions, that March 3 was excluded in the order extending the time for filing
3. appellant’s brief. The last day on which the brief could have been filed, under the rules, was March 2, and the filing two days later was not in time.

Appeal dismissed.

NOTE.—Reported in 98 N. E. 131. See, also, under (1) 38 Cyc. 330; (2) 38 Cyc. 317, 356; (3) 2 Cyc. 1020. As to the meaning of “to” in the computation of time, see 2 Ann. Cas. 518. As to the definitions of “until,” “within,” “before,” “to,” and “forthwith,” respectively, see 78 Am. St. 386.

CRONIN v. KEESLING ET AL.

[No. 7,590. Filed April 23, 1912.]

1. APPEAL.—*Matters Not Apparent of Record.—Instructions.*—Where an instruction complained of is not in the record it will not be noticed on appeal. p. 261.
2. APPEAL.—*Instructions.—Failure to Save Exceptions.*—Where appellant fails to save an exception to an instruction at the time

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it is given, the giving of such instruction is not a cause for a new trial and no question can be presented thereon for review on appeal. p. 262.

3. **APPEAL.—Instructions.—How Brought Into Record.**—Where instructions are in writing, they should be brought into the record either by filing with the clerk as provided by statute, or by filing a bill of exceptions containing the same, and if they were given orally they should be brought into the record by a bill of exceptions, or by having them reduced to writing, signed by the judge and filed with the clerk before the close of the term, as provided by §561 Burns 1908, Acts 1907 p. 652. p. 262.

4. **APPEAL.—Record.—Review.**—To warrant a reversal on appeal the record must affirmatively disclose error. p. 262.

From White Circuit Court; *Charles W. Hanley*, Special Judge.

Action by Bessie Cronin against Arthur R. Keesling and others. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Bessie Cronin, in pro. per., for appellant.

McConnell, Jenkines, Jenkines & Stuart, Lairy & Mahoney, for appellees.

ADAMS, J.—Action for libel against appellees as publishers of the Logansport Journal. The only error assigned is that “the court erred in refusing to grant appellant a new trial.”

Assuming, without deciding, that this assignment is equivalent to charging that the court erred in overruling appellant’s motion for a new trial, we find the only cause for a new trial assigned in the motion and argued in appellant’s brief is that “the court erred in giving instruction to the jury to return a verdict for the defendants.”

This instruction is not in the record, and the only reference thereto is in the order-book entry set out in the transcript, showing that the court instructed the jury to

1. return a verdict for defendants. Instructions not properly in the record will not be noticed on appeal.

Woods v. Matlock (1898), 19 Ind. App. 364, 48 N. E. 384.

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Again, it does not appear whether the instruction directing a verdict in favor of defendants was oral or in writing, and it does not appear that appellant took any exception. Instructions must be excepted to in order to be a cause for a new trial. *Port Huron Engine, etc., Co. v. Smith* (1898), 21 Ind. App. 233, 52 N. E. 106.

In order to present any question for review on appeal, it is necessary that the party appealing should have saved an exception to the instruction at the time it was given. If the instruction was in writing, it should have been brought into the record either by filing with the clerk as provided by statute, or by filing a bill of exceptions containing the instruction. If the instruction was oral, it should have been brought into the record by a bill of exceptions. Oral instructions may also be brought into the record under §561 Burns 1908, Acts 1907 p. 652, by having them reduced to writing, signed by the judge, and filed with the clerk before the close of the term, and exceptions may then be taken. *Strong v. Ross* (1905), 36 Ind. App. 174, 75 N. E. 291.

To warrant a reversal on appeal, the record must affirmatively disclose error. In this case the instruction complained of is not in the record, and it does not appear that any exception was saved to the giving of said instruction. There was, therefore, no question presented for decision by this court. *White v. Sun Publishing Co.* (1905), 164 Ind. 426, 429, 73 N. E. 890; *Jenkins v. Wilson* (1895), 140 Ind. 544, 547, 40 N. E. 39.

The judgment is affirmed.

Lairy, J., not participating.

NOTE.—Reported in 98 N. E. 303. See, also, under (1) 3 Cyc. 170, 176; (2) 2 Cyc. 724; (3) 2 Cyc. 1066; (4) 3 Cyc. 275. As to waiver of error by failure to except to instruction when given, see 99 Am. Dec. 182.

Cronin v. Logansport Daily Reporter Co.—50 Ind. App. 263.

**CRONIN v. LOGANSPORT DAILY REPORTER
COMPANY ET AL.**

[No. 7,591. Filed April 23, 1912.]

1. **APPEAL.—Assignment of Errors.—Overruling Motion for Continuance.**—The overruling of a motion for a continuance is cause for a new trial, but cannot be made an independent assignment of error, and when so assigned no question is presented. p. 263.
2. **APPEAL. Briefs.—Waiver of Error.**—Alleged error in overruling a motion to reinstate a cause is waived by failing to set out the motion or its substance in appellant's brief and failing to state any point or proposition of law thereon or to cite any authority in support thereof. p. 263.

From White Circuit Court; *Charles W. Hanley*, Special Judge.

Action by Bessie Cronin against the Logansport Daily Reporter Company and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Bessie Cronin, in pro. per., for appellant.

Joseph T. Tomlinson and *George A. Gamble*, for appellees.

ADAMS, J.—The errors assigned and relied on for reversal in this cause are that the court erred (1) in overruling appellant's motion for a continuance, and (2) in overruling appellant's motion to reinstate said cause.

The overruling of a motion for a continuance is cause for a new trial, but cannot be made an independent assignment or error, and when so assigned, no question is pre-

1. sented. *Arbuckle v. McCoy* (1876), 53 Ind. 63;

Westerfield v. Spencer (1878), 61 Ind. 339; *Hutts v. Shoaf* (1882), 88 Ind. 395.

Appellant has waived the second specification of error, by failing to set out in her brief the motion to reinstate, or the substance thereof. She has also failed to state any

2. point or proposition of law, and has cited no authority supporting this specification of error. *Pitts-*

burgh, etc., R. Co. v. Collins (1907), 168 Ind. 467, 472, 80 N. E. 415.

There being no question presented for decision by this court, the judgment is affirmed.

Lairy, J., not participating.

NOTE.—Reported in 98 N. E. 303. See, also, under (1) 2 Cyc. 999; (2) 2 Cyc. 1014. As to when denial of motion for a continuance is error, see 47 Am. Dec. 101.

BENNETT v. CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

[No. 7,884. Filed April 23, 1912.]

1. TRIAL.—*Instructions.—Peremptory.—Evidence.*—Where there is some evidence in support of every material allegation of the complaint, it is error to direct a verdict for defendant. p. 265.
2. TRIAL.—*Instructions.—Peremptory.—Consideration of Evidence.*—In passing on a motion to direct a verdict, the court cannot weigh the evidence, but must consider only the evidence favorable to the party against whom the instruction is asked, and treat all facts as true which such evidence tends to establish, and indulge in his favor every inference which the jury might reasonably draw. p. 266.
3. APPEAL.—*Assignment of Error in Giving Peremptory Instructions.—Briefs.—Sufficiency.*—The rule requiring appellant to set out in his brief a condensed recital of the evidence in narrative form, where the sufficiency of the evidence to sustain the verdict is questioned, does not apply where he seeks a reversal on the ground that it was error to direct the verdict, in which case he need only set out enough of the evidence to show that there is some evidence tending to prove every material averment of his pleading. p. 266.
4. APPEAL.—*Assignment of Error in Giving Peremptory Instructions.—Briefs.—Presumptions.*—Where appellant seeks a reversal on the ground of alleged error in directing a verdict, it will be presumed that he has set forth in his brief all of the evidence in his favor. p. 267.
5. MASTER AND SERVANT.—*Injury to Servant.—Action.—Evidence.—Sufficiency.*—Where the complaint, in an action against a railroad company for the wrongful death of an employe, alleged that defendant was negligent in constructing its main track and side-

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track too close together and in placing loose gravel between them, in placing cars on the side-track, and in using an oil lamp as a headlight on the engine of its passenger-train, evidence showing that the decedent, who was a brakeman on defendant's freight-train, after being ordered to flag the passenger-train, was found to have been struck and killed by the passenger-train, but which failed in any way to show that his death was caused by reason of either of the alleged negligent acts of the defendant, was not sufficient to sustain a verdict in favor of the plaintiff and a directed verdict for defendant was proper. p. 267.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Action by John Bennett against The Chicago, Indianapolis and Louisville Railway Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Miers & Corr, for appellant.

Brooks & Brooks, E. C. Field and *H. R. Kurrie*, for appellee.

LAIRY, J.—This action was brought by appellant to recover from appellee damages on account of the death of his minor son, John C. Bennett, who, as alleged in the complaint, was employed by appellee as a brakeman on one of its trains, and while so employed was killed through the negligence of appellee. Issues were formed, and the cause submitted to a jury for trial, and, after the evidence on the part of appellant had been introduced, the jury, acting under a peremptory instruction from the court, returned a verdict in favor of appellee. Appellant objected and excepted to the action of the court in giving this peremptory instruction, and saved the exception by a proper bill. A motion for a new trial was filed, on the sole ground that the court erred in giving this instruction. This motion was overruled, and such ruling is assigned as error on appeal, and presents the only question for decision.

It is claimed on behalf of appellant that some evidence was introduced at the trial in support of every material allegation of his complaint. If this is true, the court erred in directing a verdict in favor of appellee.

In passing on such a motion, the court cannot weigh the evidence; but it must consider only the evidence which is favorable to plaintiff, and exclude from consideration all evidence in conflict therewith. It must treat all facts

2. as true which the evidence most favorable to appellant tends to establish, and must indulge in favor of appellant every inference which the jury might reasonably draw. *Howard v. Indianapolis St. R. Co.* (1902), 29 Ind. App. 514, 64 N. E. 890; *Curryer v. Oliver* (1901), 27 Ind. App. 424, 60 N. E. 364, 61 N. E. 593; *Hall v. Terre Haute Electric Co.* (1906), 38 Ind. App. 43, 76 N. E. 334.

Appellant's brief does not contain a condensed recital of the entire evidence in narrative form, but it contains a statement of only such part of the evidence as in the opinion

3. ion of appellant is favorable to him, and tends to support the allegations of his complaint. Appellee claims that this is not a compliance with the provisions of rule twenty-two, requiring that the evidence in narrative form shall be set out in the brief of appellant in case the insufficiency of the evidence to sustain the verdict is presented by assignment of error. This point is not well taken. In this case, the question of the insufficiency of the evidence to sustain the verdict is not raised by any assignment of errors. In cases where a jury returns a verdict on a consideration of the evidence, and appellant seeks a reversal on the insufficiency of the evidence, it is necessary for him to show that there is a total want of evidence to sustain the verdict on some material point; but in a case where the court has directed a verdict in favor of defendant, and has thus taken from the jury the consideration of the evidence, and appellant seeks to reverse the case on the ground that it was error to direct the verdict, he need only show that there was some competent evidence introduced at the trial tending to prove every material allegation of the complaint. In the former case, the brief must contain a recital of the substance of the entire evidence in order to comply with rule twenty-two. If

any evidence was omitted, it would be presumed, in favor of the judgment, that the part so omitted sustained the verdict. In the latter case, however, appellant need only set out enough of the evidence to show that there is some evidence tending to prove every material averment of the complaint. If this is done, the error becomes apparent, and other evidence of a contradictory character cannot affect the question.

The complaint alleges that defendant was negligent in constructing its main track and its side-track too close together on a curve; that it had negligently placed box-cars on the side-track, and that it had negligently placed loose gravel between the main track and the side-track; that the headlight of the engine of train No. 4 was a coal-oil lamp, instead of an electric light such as is commonly used; and that there were obstructions in the neighborhood of the curve which prevented plaintiff's son from observing the approach of the train. It is also averred that the engine drawing the train on which plaintiff's son was employed was defective, and failed to make steam, and that it went dead on the track; that the conductor ordered plaintiff's son to go forward and flag No. 4; that the order given him by the conductor was one to which plaintiff's son was required to conform, and that while he was endeavoring to flag said train, he was killed by reason of the alleged negligence of defendant.

It is to be presumed that appellant has set forth in

4. his brief all the evidence favorable to him on the subject of the alleged negligence of appellee. We are not required to search the record to discover other evidence in his favor tending to prove negligence.

The evidence set forth by appellant as being favorable to him, tending to prove the allegations in the complaint, is, substantially, as follows: Appellant's son was a

5. brakeman in the employ of appellee, and was, on the night that he was killed, working on a freight-train. The train was going south, and was to meet the night north-

bound passenger-train, No. 4, at Cloverdale. The engine of the freight-train began leaking, and failed for steam and water, and appellant's son was instructed by his conductor to go ahead and flag No. 4. The conductor followed him towards Cloverdale, and found that he had been struck by No. 4, and killed. At the point where the body was found there was a very sharp curve in the main track, and along the east side of the main track there was a side-track, on which, at the time of the accident, stood several box-cars. Immediately east of the side-track at this point was a mill or elevator, and other buildings, and if there was a headlight on the approaching train it could not have been seen to exceed 250 feet towards the south. The distance from the center of the main track to the center of the side-track was about eleven feet. The box-cars projected over the rails of the side-track two feet, and the length of the pilot or dead-wood of the engine of train No. 4 was nine feet and two inches. The side-track appeared to be about one foot lower than the main track, and the space between them was covered with rough gravel.

The evidence set out fails to show that the death of appellant's son was caused by reason of the fact that the side-track was constructed in too close proximity to the main track. It shows that the distance from the center of the main track to the center of the side-track was about eleven feet, but it does not show that such proximity was unusual in the construction of railway sidings, or that it was dangerous in the ordinary operation of railroads. The evidence set out does not show that the person killed was between the main track and the box-cars on the siding at the time he was struck, nor that he was endeavoring to escape from the main track in that direction, and was prevented from so doing by reason of the proximity of said box-cars. It is not disclosed by the evidence that the loose gravel in anyway caused the injury, or that the defective headlight, or the obstructions along the track, prevented appellant's son from observing

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the approach of the train until too late to avoid the injury. On the other hand, it shows that the headlight could be seen for a distance of 250 feet. The evidence was not sufficient to sustain a verdict in favor of appellant, and the trial court did not err in directing a verdict for appellee.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 192. See, also, under (1) 38 Cyc. 1576; (2) 38 Cyc. 1586; (4) 3 Cyc. 306; (5) 26 Cyc. 1442. For a discussion of the duty and liability of a railroad company to a train employe sent out to flag an approaching train, see 18 Ann. Cas. 1143, As to the propriety of a court's instructing the jury on matters of fact, see 14 Am. St. 36.

ST. CLAIR v. PRINCETON COAL MINING COMPANY.

[No. 7,577. Filed April 24, 1912.]

1. APPEAL.—*Harmless Error.—Instructions.*—The giving of an erroneous instruction, or the refusal to give one which is proper and applicable, is not reversible error where it clearly appears from the record that no harm has resulted to the complaining party. p. 271.
2. APPEAL.—*Harmless Error.—Instructions.—Answers to Interrogatories.*—In an action by plaintiff to recover for the death of her husband while employed in defendant's coal mine, where the answers of the jury to interrogatories showed conclusively that decedent was guilty of negligence proximately contributing to his death, instructions were harmless which could have had no influence on the findings of the jury on the subject of contributory negligence, although the giving of such instructions would have been reversible error in the absence of such findings. p. 271.
3. APPEAL.—*Briefs.—Instructions.—Waiver.*—Error predicated on the refusal of an instruction is waived where such instruction is not set out in appellant's brief, and no ground of error is pointed out or suggested. p. 277.
4. APPEAL.—*Review.—Answers to Interrogatories.—Verdict.*—Where the verdict and the answers to the interrogatories were not without some evidence for their support, a cause will not be reversed on the grounds that the verdict is not sustained by sufficient evidence and that it is contrary to law. p. 277.
5. APPEAL.—*Review.—Presumptions.*—Where it affirmatively appears that any error disclosed by the record was not harmful to

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appellant, every presumption will be indulged in favor of the judgment below. p. 278.

From Gibson Circuit Court, *Herdis Clements*, Judge.

Action by Anna St. Clair against the Princeton Coal Mining Company. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

R. W. Armstrong and *Thomas Duncan*, for appellant.

Lucius C. Embree and *Morton C. Embree*, for appellee.

HOTTEL, J.—This was an action by appellant, as widow of McClellan St. Clair, deceased, for damages resulting to her on account of the death of her husband in appellee's coal mine.

The husband's death is alleged to have been caused by the negligence of appellee in failing to perform a statutory duty requiring it to sprinkle the entries in said mine, thereby permitting the air in the entries and air-passages therein to become filled and charged with fine explosive coal dust, which, it is alleged, was ignited and caused to explode as a result of a windy and fiery shot of a charge of blasting powder fired by decedent and another shot firer in said mine.

The complaint was in two paragraphs.

A demurrer was sustained to the first paragraph and overruled to the second paragraph, with exceptions to each ruling. An answer in general denial closed the issues. A trial by jury resulted in a verdict for appellee. With the general verdict were returned answers to 149 interrogatories.

Appellant's motion for new trial was overruled, and judgment rendered on the verdict. The ruling on this motion presents the only error assigned or urged by appellant. Appellee assigns cross-errors, but, in view of the conclusion reached on appellant's assignment, further notice of the cross-assignment will be unnecessary.

Error is predicated on numerous instructions given, and one refused, to which our attention is directed by appellant's brief.

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It should be stated in this connection that appellee has set out in its brief the numerous interrogatories answered by the jury and filed with its general verdict, and insists that these answers conclusively show that appellant's deceased husband was guilty of negligence proximately contributing to his death. These answers are important in the considerations of the alleged errors presented, and especially for the purpose of aiding this court in determining whether the ruling of the court in giving or refusing to give any instruction on which error is predicated resulted in harm to appellant.

It is settled by statute, and by the decisions of the Supreme Court and this court, that the giving of an instruction, even though erroneous, or the refusal to give one which is

1. proper and applicable, will not work a reversal of the case where it clearly appears from the record that no harm has resulted to the complaining party. §§407, 700, Burns 1908, §§398, 658 R. S. 1881; *Louisville, etc., R. Co. v. Wright* (1888), 115 Ind. 378, 398, 16 N. E. 144, 17 N. E. 584, 7 Am. St. 432; *Hammond, etc., Electric R. Co. v. Antonia* (1908), 41 Ind. App. 335, 344, 83 N. E. 766; *Nichols v. Central Trust Co.* (1909), 43 Ind. App. 64, 69, 86 N. E. 878; *Tucker v. Roach* (1894), 139 Ind. 275, 277, 278, 38 N. E. 822; *American Car, etc., Co. v. Clark* (1904), 32 Ind. App. 644, 652, 70 N. E. 828; *Gilliland v. Jones* (1896), 144 Ind. 662, 666, 43 N. E. 939, 55 Am. St. 210; *Haxton v. McClaren* (1892), 132 Ind. 235, 247, 31 N. E. 48; *Indianapolis St. R. Co. v. Schomberg* (1905), 164 Ind. 111, 114, 72 N. E. 1041.

We have examined these answers with care, and find that they sustain the contention of appellee, in that they show conclusively that appellant's deceased husband was

2. guilty of negligence proximately contributing to his death. These answers, on this branch of the defense alone, would have required the court below, on proper motion, to render judgment thereon for appellee, though the general verdict had been for appellant.

The interrogatories and answers thereto, important on this phase of the case, are as follows:

“(17) Did not said Whitman, on or prior to the 7th day of January, 1908, in his work of mining coal, drill and charge with powder a shot in the solid coal in said mine? A. Yes.

(18) Was not the shot so drilled and charged by said Whitman fired on the evening of the 7th day of January, 1908? A. Yes.

(19) Did not said shot when so fired fail to throw down the coal that was intended to be thrown down by it? A. Yes,

(20) Did not said shot so drilled and charged by said Whitman, when fired on the 7th day of January, 1908, blow out at the opening of the drill hole thereof, and make a crack in said coal extending from said drill hole? A. Yes.

(21) Did not said Whitman re-charge the same shot on the 8th day of January, 1908, that had so blown out and cracked said coal on the evening before? A. Yes.

(22) Did not said McClellan St. Clair and one Solomon Lawrence fire said shot on the evening of said 7th day of January, 1908? A. Yes.

(23) Did not said McClellan St. Clair and said Solomon Lawrence fire said shot again on the evening of the 8th day of January, 1908? A. Yes.

(24) Did not said shot when fired on the 8th day of January, 1908, again fail to throw down the coal that it was intended to throw down? A. Yes.

(25) Did not said shot when re-fired as aforesaid, on the evening of the 8th day of January, 1908, again blow out at the drill hole? A. Yes.

(26) When said shot again blew out at the drill hole, on the evening of the 8th day of January, 1908, did not the fire and gases thereof shoot out into said room, along the entries, air ways and breakthroughs of said mine with great force? A. Yes. * * *

(30) Did not the death of McClellan St. Clair result

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from the explosion that was caused by the re-firing of said shot on the evening of the 8th day of January, 1908? A. Yes.

(31) When they re-fired said shot on the evening of the 8th day of January, 1908, did not said McClellan St. Clair and Solomon Lawrence know that it was the same drill hole as the shot they had fired the evening before? A. Yes.

(32) Would any dust in the mine have exploded at the time that McClellan St. Clair was killed, if fire and flame from the shot that was placed by Whitman had not come in contact with it after that shot was fired. A. No. * * *

(34) Was not McClellan St. Clair at the time of his death an experienced coal miner? A. Yes.

(35) What was the age of McClellan St. Clair at the time of his death? A. 34 years.

(36) Did said McClellan St. Clair on the day of his death have any defect or weakness in his eyesight? A. No.

(37) How long had said McClellan St. Clair been engaged in the occupation of coal mining at the time of his death? A. 8 years.

(38) If there was any reason why said McClellan St. Clair did not know that said shot re-fired by him and Lawrence, on the evening of the 8th day of January, 1908, was in the same drill hole as the shot that was fired by them the evening before, state what the reason was? A. No.

(39) Was not the shot placed by Harry Whitman in his working place on the 5th south entry on the east side of the mine, the last shot fired by McClellan St. Clair and Solomon Lawrence on the day of their death. A. Yes. * * *

(45) Was not said shot so placed by Whitman so drilled into the solid coal about twenty inches past the end of the cutting 'loose end' or chance? A. Yes.

(46) Was not said shot so placed by Whitman on the 8th day of January, 1908, tamped with coal slack? A. Yes.

(47) Was not the point of the shot so placed by Whit-

man on the 8th day of January, 1908, about seven feet distant from the 'loose end' 'chance' or end of cutting? A. Yes.

(48) Was not the shot so placed by Whitman on the 8th day of January, 1908, drilled into the solid coal more than 7 feet? A. Yes. * * *

(57) Did not the crack in the coal that was caused by the shot that was fired in Whitman's working place, on the 7th day of January, 1908, render it dangerous for St. Clair and Lawrence to fire the shot in the same drill hole on the day of the explosion? A. Yes.

(58) Could not the crack in the coal have been discovered by St. Clair and Lawrence, by ordinarily careful inspection before they fired the shot that caused the explosion? A. Yes. * * *

(66) Did any one other than St. Clair and Lawrence fire any shots in the defendant's said mine, on the evening of January 8, 1908, before the time they were killed? A. No.

(67) Was not the explosion that resulted in the death of St. Clair caused by the fact that in drilling and charging the shot which brought the explosion about, it was done in such manner that the drill hole was more than seven feet deep, that it extended some twelve inches into the solid coal beyond the end of cutting, 'loose end' or 'chance' that at its point the drill hole was more than seven feet from the end of cutting 'loose end' or 'chance' measured at right angles to the direction of the drill hole, that the shot was tamped with coal slack, and that the shot was charged in the same drill hole from which a shot had been fired the day before, whereby a crack was made in the coal extending downward from the drill hole? A. Yes. * * *

(75) If the decedent St. Clair, had made an ordinarily careful inspection of the shot that caused the explosion, before it was fired, could he not have discovered: (A) That the drill hole at its point was more than five feet distant from the end of cutting, 'loose end' or 'chance' measured at right

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angles to the direction of the drill hole? A. Yes. (B) That the shot was tamped with coal slack? A. Yes. (C) That there was a crack in the coal extending downward from the drill hole? A. Yes. * * *

(87) Was not the fire and force of the explosion of the blasting powder that exploded in the defendant's mine at the time the said St. Clair was killed, sufficient in itself to have killed him at the place at which he was killed? A. Yes.

(88) Was not McClellan St. Clair on the day of his death employed to fire the shots placed in the defendant's mine by the coal miners working therein? A. Yes.

(89) Was not St. Clair employed by the miners working in the defendant's mine, to fire the shots placed by them in said mine, in the process of their work of mining coal? A. Yes.

(90) Was not St. Clair so employed by the miners at a meeting held by them, at the meeting place of the Miner's Union, in the City of Princeton, Indiana, sometime before his death? A. Yes. * * *

(106) Was not a part of the duty of McClellan St. Clair to make an ordinarily careful inspection and examination of the shot that caused the explosion, before firing it, in order to ascertain whether the same had been drilled and charged and tamped in such manner that it would be safe to fire it? A. Yes.

(107) Would not such an examination have revealed the angle at which the drill hole penetrated the coal? A. Yes.

(108) Would not such an examination have revealed the fact that the drill hole at its point was more than five feet distant from the end of cutting, 'loose end' or 'chance' measured at right angles to the direction of the drill hole? A. Yes.

(109) Would not such an examination have revealed the crack that had been made in the coal by the shot of the day before? A. Yes. * * *

(112) Was not the drill hole in which the shot that

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caused the explosion that resulted in the death of St. Clair, drilled into the solid coal at such an angle to the end of cutting, 'loose end' or 'chance' that at its 'heel' it was about three and a half feet and at its point about six feet or more from said end of cutting, 'loose end' or 'chance' measured at right angles to the direction of the drill hole? A. Yes.

(113) Did not the miner, Harry Whitman, charge the shot that caused the explosion in issue with more than six pounds of powder? A. Yes. * * *

(121) While St. Clair and Lawrence were firing shots on the east side of the mine, on the day of the explosion, was any other work going on in the mine that caused any dust to be in the air in the 5th south entry on the east side of the mine? A. No. * * *

(129) Was any of the coal at the places where St. Clair and Lawrence fired shots on the evening of January 8, 1908, under cut by machinery? A. No.

(130) Did the coal mine in which said McClellan St. Clair is alleged to have been killed produce block coal. A. No."

In addition to the facts found by the jury showing negligence of decedent contributing to his death, other facts are found which would raise a serious doubt as to appellant's right to recover, but these we need not consider. The jury having found the facts showing that decedent was guilty of such negligence, it necessarily follows that the verdict of the jury was right, and that the judgment below should be affirmed, unless some one or more of the rulings of the court below, complained of, and relied on as error, in some way influenced the jury to appellant's prejudice in the answer it made to said interrogatories affecting such question.

We have examined all the several instructions given, which could be said to have influenced in any way said answers to interrogatories on said question, and are of the opinion that in no event could they have had any influence on the jury prejudicial to appellant. Two or three of the instructions

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on other questions are open to criticism, and in the absence of said answers, the giving of the same, we think, would have constituted reversible error, but they could have had no influence on the findings of the jury on this subject of contributory negligence.

Error is predicated on but one refused instruction, and it is not set out in appellant's brief, and no ground of error on account of such refusal is pointed out or suggested. Error, if any, on account of such refusal, is therefore waived.

The only other grounds of the motion for new trial are that the verdict is not sustained by sufficient evidence, and that it is contrary to law. These grounds are merely mentioned in appellant's brief, and no reasons given or authorities cited in support thereof.

An examination of the evidence convinces us that the verdict and the answers to the interrogatories heretofore given, were not without some evidence for their support, and that appellant is not entitled to a reversal of the judgment on either of said grounds of her motion for new trial.

It should be stated that since this appeal was taken, a case involving a suit for damages for the death of the associate shot firer of appellant's deceased husband, resulting from the same explosion here involved, has been decided by the Supreme Court. (*Princeton Coal, etc., Co. v. Lawrence* [1911], 176 Ind. 469, 95 N. E. 423.) In this connection it is due appellant that we should also state that several of the questions presented by this appeal, especially those urged by appellee on its cross-assignment of error, were by that case decided adversely to appellee's contention, and the law applicable to this case, as recognized and expressed in that case, would probably require a reversal of the judgment in this case, but for the effect of the general verdict and answers to the interrogatories in this case. The inconsistency of the judgments in the two cases results from the fact that the verdict in the former case was for the plaintiff, while in this

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case it is for the defendant, and also from the difference in the facts found by the answers to the interrogatories, supporting the two verdicts. This court fully recognizes the correctness of the law as applied to the former case, and feels that but for the answers to interrogatories in this case, there

should be a reversal. However, the rule of this court

5. and the Supreme Court, which indulges every presumption in favor of the judgment below, and prevents reversal thereof on account of any error which the record discloses could not have harmed appellant, necessitates the affirmance of this judgment.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 197. See, also, under (1) 38 Cyc. 1809, 1816; (2) 38 Cyc. 1815; (3) 2 Cyc. 1014; (4) 3 Cyc. 348; (5) 3 Cyc. 387. As to immaterial errors in appellate proceedings, see 47 Am. Dec. 465.

HUGHES ET AL. v. CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

[No. 7,608. Filed April 24, 1912.]

1. **APPEAL.—Assignment of Errors.—Dismissal of Appeal from Justice of the Peace.**—Error in sustaining a motion to dismiss an appeal from a justice of the peace is not an “error of law occurring at the trial” and can only be presented on appeal by an independent assignment of error. p. 279.
2. **JUSTICES OF THE PEACE.—Judgment.—Form.—Sufficiency.**—A judgment of a justice of the peace, although informal and open to criticism, is sufficient in form to evidence a judgment, where, when fairly construed, it shows a trial, a finding in favor of defendant, and a judgment that plaintiffs take nothing by their action and pay the costs of suit. p. 280.
3. **JUSTICES OF THE PEACE.—Judgment.—Form.—Necessity of Signature to Judgment on Appeal to Circuit Court.**—Although under §§1725, 1780 Burns 1908, §§1437, 1489 R. S. 1881, a judgment of a justice of the peace is not valid until it has been entered of record and signed, his failure to sign a judgment from which an appeal has been taken to the circuit court is not ground for dismissal of the appeal, where such appeal was otherwise regular

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under the statute and the transcript showed that the justice had jurisdiction and rendered a judgment. pp. 280, 282.

4. JUSTICES OF THE PEACE.—*Appeal to Circuit Court.—Trial De Novo.*—On appeal to the circuit court from the judgment of a justice of the peace, there is no question of correcting errors, but the cause is tried *de novo*. p. 282.

From Carroll Circuit Court; *James P. Wason*, Judge.

Action by Sidney R. Hughes and another against the Chicago, Indianapolis and Louisville Railway Company. From a judgment for defendant, the plaintiffs appeal. *Reversed*.

C. W. Watkins, C. A. Butler and A. C. Johnson, for appellants.

E. C. Field, H. R. Kurrie and C. R. Pollard, for appellee.

FELT, C. J.—Appellants brought this action against appellee to recover damages for the loss of a trunk. The cause was tried by a justice of the peace, without a jury, and from a finding and judgment against them, appellants appealed to the Carroll Circuit Court. On motion of appellee, the appeal was there dismissed, and appellants now allege error in such ruling.

Appellee first contends that error, if any, in dismissing an appeal from a justice of the peace cannot be reviewed in the Appellate Court on an independent assignment

1. of error, as in this case, but that such error can only be presented as one of the grounds of a motion for a new trial. Appellee's position is, however, not well taken, for error in sustaining a motion to dismiss an appeal from a justice is not an "error of law occurring at the trial", and the only way to present the question of the correctness of such ruling is by an independent assignment of error. *Galey v. Mason* (1910), 174 Ind. 158, 161, 91 N. E. 561; *Werley v. Huntington Water-Works Co.* (1894), 138 Ind. 148, 153, 37 N. E. 582; *Tibbetts v. O'Connell* (1879), 66 Ind. 171; *Vawter v. Gilliland* (1876), 55 Ind. 278; *Tyler v. Bowlus* (1876), 54 Ind. 333.

The substance of appellee's motion to dismiss the appeal

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to the circuit court is that it does not appear from the transcript that the justice ever entered a judgment such as authorized an appeal. Appellee bases his contention on two grounds:

(1) That what purports to be the judgment of the justice is, in fact, no more than a finding, and (2) the alleged judgment is not signed by the justice.

It is true that the judgment in question is informal, and its phraseology open to criticism, but, when liberally and fairly construed, the language shows a trial, a finding
2. in favor of appellee (defendant below), and a judgment that plaintiffs take nothing by their action, and pay the costs of suit. This is a final disposition of the action, and is sufficient in form to evidence a judgment. 24 Cyc. 654; *Kennard v. Carter* (1878), 64 Ind. 31, 40; *Britton v. State, ex rel.* (1876), 54 Ind. 535, 540; *Brewer v. Murray* (1845), 7 Blackf. 567.

The statutes (§§1725, 1780 Burns 1908, §§1437, 1489 R. S. 1881) require the judgment of a justice of the peace to be entered of record and signed, and it has been held

3. that until this is done there is no valid judgment.

Galbraith v. Sidener (1867), 28 Ind. 142, 150; *Emery v. Royal* (1889), 117 Ind. 299, 303, 20 N. E. 150; *State, ex rel., v. Wanee* (1892), 4 Ind. App. 1, 30 N. E. 161.

Section 1725, *supra*, requires a justice of the peace to keep a docket, "in which he shall record the proceedings, in full of all suits instituted before him; which record shall contain the names of the parties at full length, a copy of the cause of action, * * * and * * * be signed by such justice," etc.

In the case of *Indianapolis, etc., R. Co. v. Smither* (1863), 20 Ind. 228, a motion to dismiss, made in the circuit court on appeal from a justice's court, because the justice had failed to copy in his record "the plaintiff's cause of action", was overruled. This case has been followed in later decisions.

Hughes v. Chicago, etc., R. Co.—50 Ind. App. 278.

Hopper v. Lucas (1882), 86 Ind. 43, 50; *Reed v. Whitton* (1881), 78 Ind. 579.

In *Catterlin v. City of Frankfort* (1882), 87 Ind. 45, it was held that the fact that the judgment of the circuit court was signed in vacation rendered it irregular but not void.

In *Baldwin v. Runyan* (1893), 8 Ind. App. 344, 35 N. E. 569, where the jurisdiction of a justice of the peace was questioned, this court, by Reinhard, J., said: "The circuit court is not a court of error, and does not undertake to review the proceedings before the justice. It can only inquire into the jurisdiction of the justice for the purpose of deciding whether it has itself jurisdiction, and when it has so found, it proceeds to try and dispose of the case as an original action."

In *O'Reilly v. Block* (1893), 23 N. Y. Supp. 670, under a statute very similar to ours, it was held that the unsigned minutes of the justice, showing the amount of the judgment, for whom rendered, and awarding costs, was sufficient on appeal to give the court jurisdiction, provided the appeal was otherwise regular.

It has been held in other jurisdictions that for the purposes of an appeal it is immaterial whether the judgment of a justice of the peace is valid or invalid, provided it appears that he had jurisdiction of the person and of the subject-matter. *Finke v. Lukensmeyer* (1892), 51 Minn. 252, 53 N. W. 546; *Gielt v. McGannon Mercantile Co.* (1898), 74 Mo. App. 209; *Stephenson v. Jones* (1900), 84 Mo. App. 249, 255; *Turner v. Harrison* (1884), 43 Ark. 233; *Matlock v. King* (1856), 23 Mo. 400.

While the question has not been squarely decided in Indiana in regard to the effect of an unsigned judgment of a justice of the peace on appeal to the circuit court, our decisions on kindred questions, and the decisions of other courts, fully warrant us in holding that the question is different from those arising where the validity of the judgment is

questioned in a proceeding involving the rights of persons or property, as upon execution or the like.

The case on appeal is to be tried *de novo*. It is not a question of correcting errors. In this case the justice of the

peace filed with the clerk of the court his duly signed

4. and verified transcript of the proceedings in the case before him. This was sufficient to show that he had

jurisdiction of the person of the defendant and of the subject-matter, and rendered a judgment, though irregu-

3. lar in form. The appeal was otherwise regular under the statute, and the transcript was sufficient to give

the circuit court jurisdiction, and it should have proceeded to a trial of the case on its merits.

The following authorities tend to support this conclusion: 24 Cyc. 723; *State, ex rel., v. Miller* (1878), 63 Ind. 475; *Britton v. Fox* (1872), 39 Ind. 369; *Fitch v. Byall* (1897), 22 Ind. App. 628, 631, 47 N. E. 180; *Mann v. Barkley* (1898), 21 Ind. App. 152, 51 N. E. 946.

The other grounds of the motion to dismiss, if good for any purpose, present the same question as the one already discussed.

The judgment is therefore reversed, with instructions to the lower court to overrule the motion to dismiss the appeal, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 98 N. E. 317. See, also, under (1) 2 Cyc. 999, 1,000; (2) 24 Cyc. 600; (3) 24 Cyc. 603; (4) 24 Cyc. 725. As to the conclusiveness of a judgment by a justice of the peace, see 47 Am. Dec. 263.

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**CINCINNATI, LAWRENCEBURG AND AURORA ELECTRIC
STREET RAILROAD COMPANY v. BALTIMORE AND
OHIO SOUTHWESTERN RAILROAD COMPANY.**

[No. 7,616. Filed April 25, 1912.]

1. **PLEADING.—Complaint.—Construction.**—A complaint must be construed with reference to the requirement of §343, subd. 2, Burns 1908, §338 R. S. 1881, that the action shall be stated in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. p. 284.
2. **NEGLIGENCE.—Damage to Property.—Complaint.—Negating Contributory Negligence.**—In an action for damage to property caused by defendant's negligence, the complaint must allege not only that defendant was negligent, but that such negligence was the proximate cause of the accident, and that plaintiff was free from contributory negligence. p. 285.
3. **RAILROADS.—Crossing Accident.—Damage to Property.—Negligence.—Complaint.**—A complaint alleging that defendant's passenger-train, in approaching a street crossing at a speed of twenty miles an hour and in violation of a city ordinance forbidding passenger-trains to be run at a greater speed than twelve miles per hour, collided with plaintiff's car and that if the train had been running at a rate of speed not exceeding twelve miles per hour, the employes in charge thereof could have seen plaintiff's car on the crossing and the signals of plaintiff's employes in time to have stopped said train before striking the car, sufficiently charges actionable negligence. pp. 285, 287.
4. **RAILROADS.—Operation.—Municipal Regulations.**—Railroad companies and their servants owe obedience to municipal ordinances relative to the running of locomotives and trains, intended to protect the lives and property of persons. p. 287.
5. **RAILROADS.—Crossing Accident.—Damage to Property.—Contributory Negligence.—Complaint.**—In an action against a railroad company to recover for the destruction of plaintiff's interurban car in a crossing accident, where the complaint alleged that the collision occurred within five minutes after the trolley-wheel of plaintiff's car became disconnected from the trolley-wire and caused the car to remain standing upon the crossing, that plaintiff's employes used all means within their power to replace the trolley-wheel and move the car off the crossing, but were unable to do so in time to prevent the collision, and that when defendant's train was heard approaching said employes ran toward it

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“waiving their arms and hallooing,” but could not attract the attention of the persons in charge thereof in time to stop it and avoid the collision, the question of whether unnecessary time was consumed in endeavoring to move the car before leaving it to signal the train to stop, as well as the acts of plaintiff’s employes in signalling the train to stop, were proper matters to be considered upon a trial in determining whether plaintiff was guilty of contributory negligence, but could not as a matter of law override and control the direct allegation of the complaint that the collision occurred through no fault of the plaintiff, its agent or employes. p. 287.

From Dearborn Circuit Court; *George E. Downey*, Judge.

Action by the Cincinnati, Lawrenceburg and Aurora Electric Street Railroad Company against the Baltimore and Ohio Southwestern Railroad Company. From a judgment for defendant, the plaintiff appeals. *Reversed*.

Frank B. Shults and *Martin J. Givan*, for appellant.

Edward Barton, R. S. Alcorn, McMullen & McMullens, for appellee.

MYERS, J.—This was an action for damage to property caused by a collision between one of appellee’s locomotives and one of appellant’s interurban cars.

Appellee’s demurrer for want of facts to appellant’s amended second paragraph of complaint was sustained. The first paragraph was dismissed, and appellant refusing to plead further, the court rendered judgment in favor of appellee.

The sustaining of the demurrer is assigned as error.

The pleading is before us for review, and must be construed with reference to the legislative requirements that it shall contain “a statement of the facts constituting

1. the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.” §343 subd. 2 Burns 1908, §338 R. S. 1881.

The nature of this action made it necessary for appellant to allege and prove not only that appellee was negligent, but

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that such negligence was the proximate cause of the
2. accident, and that appellant was free from contributory negligence. *Cincinnati, etc., St. R. Co. v. Klump* (1906), 37 Ind. App. 660, 77 N. E. 869.

It appears from the paragraph in question that on February 26, 1908, appellant was, and for two years prior thereto had been, operating an interurban electric railroad
3. along and on George street, in the city of Aurora, and that during all of said time appellee was engaged in operating a steam railroad through said city, crossing the tracks of appellant on said street; that between 7 and 8 o'clock p. m. on said day, one of appellant's cars in charge of a conductor and motorman, and equipped with a trolley-pole and wheel connecting it with an overhead trolley-wire, charged with a high voltage of electricity, stopped at a point on said street within the corporate limits of said city, where the tracks of appellant and appellee cross each other, by reason of said wheel becoming disconnected from the trolley-wire; that the equipment and appliances of said car, including the wheel and trolley-pole, were the best and most approved in use by such interurban companies; that at the time aforesaid, and for years prior thereto, an ordinance adopted by the common council of said city was in full force and effect, making it unlawful for any engineer or other person in charge of a locomotive engine, or operating the same on any railroad within the corporate limits of said city, to permit the same to run or to be run, if attached to a passenger-train, at a greater rate of speed than twelve miles per hour; "that within five minutes" after said car stopped on said railroad crossing, one of appellee's passenger-trains, drawn by a locomotive engine, operated by an engineer and fireman, the servants and employes of appellee, approached said crossing on George street from the west, within the corporate limits of said city, at a high, dangerous and unlawful rate of speed, to wit, twenty miles per hour, and over and on said public street and against appellant's said car

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standing on said crossing, thereby knocking it off the track and demolishing it, to appellant's damage; that said car was destroyed and demolished as aforesaid, and appellant damaged by reason thereof through no fault or negligence on its part, or on the part of its said agents, employes or servants in charge of said car; that appellant sustained said damage on account of the destruction of said car by reason of the unlawful and negligent act of appellee in running its locomotive and passenger-train within the corporate limits of said city at a high, dangerous and unlawful rate of speed of twenty miles per hour, and not otherwise; that appellant's servants in charge of said car were not able to move it from said railroad crossing until the trolley-wheel was put in position against said wire carrying the electricity; that when said car stopped as aforesaid, said employes of appellant "used all means within their power by trying to replace said trolley pole upon said wire and thereby convey power to said car and move said car from off of said railroad crossing, but were unable so to do in time to prevent the collision;" that they did not know or could not have known by the exercise of ordinary diligence that appellee was running its said locomotive engine and train towards said crossing at the unlawful rate of speed of twenty miles per hour, but as soon as they heard the noise of the approaching locomotive and passenger-train toward said crossing, and when at a distance of 1,000 feet from the crossing, appellant's said employes ran down appellee's railway right of way toward said approaching train, "waving their arms and hallooing to attract the attention of defendant's said servants running said train, but, owing to the rapidity with which said defendant's locomotive engine and train of passenger-cars approached said crossing, said servants of said plaintiff could not give said notice to the agents, servants and employes of said defendant in charge of said locomotive engine and passenger-train in time to enable them to stop said engine and train before run-

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ning said engine against said car of said plaintiff standing on said railroad crossing;” that had appellee’s employes in charge of said locomotive engine and train run the same within the corporate limits of said city, at a rate of speed not exceeding twelve miles per hour, they could have seen said car on said crossing, and the signals aforesaid of appellant’s employes to stop said train, and brought said locomotive and train to stop before striking said car; that the destruction of said interurban car was caused by the negligence and unlawful acts of appellee’s employes in charge of said locomotive engine and train, and that appellant or its said employes were not guilty of any negligence contributing to said collision.

The ordinance of the city of Aurora relative to the running of locomotives and trains within the corporate limits of that city, was intended as a safeguard to the lives

4. and property of persons. It was a law to which appellee and its servants both owed obedience. *Baltimore, etc., R. Co. v. Peterson* (1901), 156 Ind. 364, 371, 59 N. E. 1044. By its terms a duty was imposed on appellee not to run a locomotive or passenger train within said city limits at a greater speed than twelve miles an hour. The

paragraph in question charges appellee with a violation of that duty, and injury to appellant’s property as the proximate cause of such violation. The pleaded

3. facts were clearly sufficient to charge appellee with actionable negligence. *Pittsburgh, etc., R. Co. v. Lightheiser* (1904), 163 Ind. 247, 71 N. E. 218, 71 N. E. 660; *Pennsylvania Co. v. Stegemeier* (1889), 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136.

The next question is, Does the paragraph in question negative contributory negligence? This question must be answered in the affirmative, unless the showing that

5. the collision occurred “within five minutes” after the car stopped, or unless it can be said that appel-

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lant's servants and employes in not signaling the train when at a distance from the crossing, nor in time for it to stop and avoid the collision, constitute negligence.

The allegation as to time is less than five minutes. How much less does not appear, but it is, in effect, shown that the employes in charge of the car were not able to move it except by means of power obtained by replacing the trolley-wheel on the trolley-wire, which, as soon as the car stopped, they endeavored to do by the use of all means within their power. This court does not judicially know the length of time required to replace a trolley-wheel on an overhead trolley-wire under all conditions and circumstances. If the connection was to be made in the nighttime, as in this case, the length of time required might vary by persons equally skilled in the business, depending on their ability to see, on account of the light or darkness of the night, and other conditions necessary to be considered in determining the fact whether unnecessary time was consumed in the endeavor to move the car before leaving it to signal the train to stop. The question thus presented, as well as the acts of appellant's employes in signaling the train to stop, were all proper matters for consideration on a trial in determining the fact whether appellant was guilty of contributory negligence, but they are not sufficient as matters of law to override and control the direct allegation that the collision occurred "through no fault or negligence upon the part of said plaintiff or upon the part of said plaintiff's said agents, employes or servants in charge of the running of said car."

The paragraph stated a cause of action.

Judgment reversed, with instruction to overrule appellee's demurrer, and to further proceed with the case.

NOTE.—Reported in 98 N. E. 304. See, also, under (1) 31 Cyc. 73; (2) 29 Cyc. 572, 575; (3) 33 Cyc. 745; (4) 33 Cyc. 648; (5) 33 Cyc. 750. As to breach of statutory duty, in respect of speed of trains, as negligence, see 36 Am. St. 817. Upon the rate of speed preventing stoppage of trains within distance disclosed by headlight, see 39 L. R. A. (N. S.) 978.

BOGGS v. TONEY.

[No. 7,621. Filed April 25, 1912.]

1. **NEW TRIAL.—Grounds.—Excessive Damages.**—The provision of §585, subd. 4, Burns 1908, §559 R. S. 1881, for granting a new trial on the ground of excessive damages applies only in tort actions. p. 290.
2. **APPEAL.—Presenting Ground for Review in Trial Court.—Motion for New Trial.—Grounds.**—No question is presented by a motion for a new trial based on §585, subd. 5, Burns 1908, §559 R. S. 1881, alleging error in assessing the amount of recovery, but failing to state in what respect the jury erred. p. 290.
3. **FRAUDS, STATUTE OF.—Parol Lease.—Validity.**—A lease for one year is valid without being reduced to writing. p. 291.
4. **APPEAL.—Briefs.—Failure to Set Out Instruction.—Waiver of Error.**—Error in the giving of an instruction is waived where appellant fails to set out the instruction in his brief or to point out the alleged error. p. 291.
5. **FRAUDS, STATUTE OF.—Parol Lease.—Breach.—Instruction.**—In an action for breach of a parol lease for the term of one year, an instruction which told the jury that, if it found the agreement to have been entered into and that there was a breach thereof, as alleged in the complaint, it should find for the plaintiff, was not erroneous for stating that it was not material whether such agreement was to be reduced to writing or to rest in parol. p. 291.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by Charles Toney against Albert Boggs. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William Robinson and *John W. Strawn*, for appellant.

Sheridan & Gruber, for appellee.

FELT, C. J.—Appellee brought this action for damages for breach of a parol lease. A trial by jury resulted in a verdict in his favor. Appellant moved for a new trial, which motion was overruled, and judgment rendered on the verdict. The only error assigned is that the court erred in overruling the motion for a new trial, which was asked for the following reasons:

- (1) The damages assessed by the jury are excessive.
- (2) The jury erred in assessing the amount of recovery.
- (3) The verdict of the jury is not sustained by sufficient evidence.
- (4) The verdict of the jury is contrary to law.
- (5) The court erred in giving each of instructions one and three requested by appellee.

This is an action *ex contractu*, and not an action *ex delicto*. Neither of the first two grounds of the motion raises any question as to the amount of the verdict in such a

1. case. The first ground is applicable only in tort actions, and the second fails to state in what respect the
2. jury erred. §585, subds. 4, 5, Burns 1908, §559 R. S. 1881; 28 Am. and Eng. Ency. Law (2d ed.) 255; *Smith v. Barber* (1899), 153 Ind. 322, 332, 53 N. E. 1014; *Lake Erie, etc., R. Co. v. Acres* (1886), 108 Ind. 548, 9 N. E. 453; *Moore v. State, ex rel.* (1888), 114 Ind. 414, 422, 16 N. E. 836; *McCormick, etc., Mach. Co. v. Gray* (1888), 114 Ind. 340, 16 N. E. 787; *American Quarries Co. v. Lay*, (1906), 37 Ind. App. 386, 391, 73 N. E. 608; *Stabno v. Leeds* (1901), 27 Ind. App. 289, 60 N. E. 1101.

Furthermore, if the question were properly presented, there is no showing that the verdict for \$100 was not fully warranted by the evidence.

Appellant, in his brief, has made only a meager statement of the evidence, and has not fully complied with the rules of this court in that respect. However, it appears that there was evidence tending to show that on January 3, 1910, appellant and appellee entered into negotiations concerning the leasing of a pool-room belonging to appellant; that the terms of the lease were agreed on; that appellee paid appellant the sum of \$25 to bind the agreement, for which sum appellant executed his receipt "on acct. of lease on pool-room"; that the lease was for one year, and appellee was to take possession of the property on the next morning, when the

contract was to be reduced to writing; that on the next day appellant refused to execute the lease, and refused to deliver possession of the property to appellee.

- A lease for one year is not required to be in writing
3. to be valid, and from the foregoing evidence the jury was warranted in finding for appellee.

Appellant also assigns error in the giving of in-

4. structions one and three, tendered by appellee, but as he has failed to set out instruction three in his brief, and has not pointed out the alleged error therein, he has waived the error, if any. *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 497, 77 N. E. 945; *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489, 498, 72 N. E. 996; *McNulty v. State* (1906), 37 Ind. App. 612, 616, 76 N. E. 547, 117 Am. St. 344.

The first instruction, after stating the theory of appellee's complaint, told the jury, in substance, that it should find for appellee, if it believed from a preponderance of the

5. evidence that appellant and appellee entered into an agreement, by the terms of which appellant was to lease the property described in the complaint to appellee substantially on the terms alleged in the complaint, and that after so entering into such an agreement, and accepting the payment of earnest money thereon, he refused to comply with the terms thereof, and either to execute the written contract or to carry out the parol lease. The instruction also stated that it was "not material whether it was the contract that such lease was to be reduced to writing or whether it was to rest in parol." Appellant objects to that part of the instruction quoted, but has failed to point out wherein it is erroneous or harmful. Appellee sued on a definite parol contract, and the mere fact, if it is a fact, that by the terms of such agreement it was thereafter to be reduced to writing, is not material on the facts of this case.

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The trial court did not err in overruling appellant's motion for a new trial, and the judgment is therefore affirmed.

NOTE.—Reported in 98 N. E. 306. See, also, under (1) 28 Cyc. 843; (2) 29 Cyc. 942; (3) 20 Cyc. 214; (4) 2 Cyc. 1016; (5) 20 Cyc. 321. As to parol lease as affected by the statute of frauds, see 17 Am. St. 752.

HUDSON v. INDIANA UNION TRACTION COMPANY.

[No. 7,554. Filed April 25, 1912.]

1. **APPEAL.—Action for Personal Injuries.—Death of Party.—Abatement.**—Under the provisions of §283 Burns 1908, §282 R. S. 1881, the appeal, in an action for personal injuries, abates on the death of the plaintiff. p. 292.

From Howard Circuit Court; *Lex J. Kirkpatrick*, Judge.

Action by Samantha M. Hudson against the Indiana Union Traction Company. From a judgment for defendant, the plaintiff appeals. *Dismissed.*

C. S. Crowley, B. F. Harness, B. C. Moon and W. R. Voorhis, for appellant.

J. A. Van Osdol and Blacklidge, Wolf & Barnes, for appellee.

ADAMS, J.—This action was brought by appellant against appellee, to recover damages growing out of a personal injury received by appellant, on account of the alleged negligence of appellee. On issues joined, the cause was submitted to a jury, and a verdict returned for appellee. Judgment was rendered on the verdict, from which appellant prosecutes this appeal.

It is now shown to this court that since submission

1. appellant has died. As the action was one for personal injuries, the appeal abated on the death of appellant, as provided by §283 Burns 1908, §282 R. S. 1881.

Appeal dismissed.

NOTE.—Reported in 98 N. E. 188. See, also, 2 Cyc. 772. As to abatement of actions by death of party, see 29 Am. St. 816.

March v. March—50 Ind. App. 293.

MARCH v. MARCH.

[No. 7,534. Filed April 26, 1912.]

1. **APPEAL.—Review.—Presumptions.**—On appeal, the presumption is in favor of the proceedings of the trial court, and the burden is on the party alleging error to affirmatively point it out. p. 295.
2. **APPEAL.—Review.—Searching Record.**—The court will not search the record on appeal to reverse a cause, but may do so to affirm it. p. 295.
3. **APPEAL.—Review.—Presumptions.—Sufficiency of Complaint.**—Where appellant challenges the sufficiency of the complaint for want of facts, but fails to point out any omitted fact essential to a recovery, the complaint will be presumed to contain facts sufficient to bar another action for the same cause. p. 295.
4. **APPEAL.—Review.—Rulings on Demurrers.—Finding and Judgment Not Affected.**—Alleged error in overruling the demurrer to a paragraph of reply will be disregarded where the finding and judgment is not dependent upon any issue tendered by the reply or the answer to which it was addressed. p. 295.
5. **APPEAL.—Review.—Sufficiency of Evidence.**—A cause will not be reversed for insufficiency of the evidence to show a fact that was not essential to the recovery. p. 295.
6. **APPEAL.—Review.—Harmless Error.**—Under the provisions of §§407, 700 Burns 1908, §§389, 658 R. S. 1881, the judgment will not be disturbed on account of intervening error where it appears from the record that the error was harmless and that a fair trial was had and a correct conclusion reached by the trial court. p. 296.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Anna B. March against William F. March.
From a judgment for plaintiff, the defendant appeals. *Affirmed.*

James M. Hatfield, for appellant.

Watkins & Butler, for appellee.

MYERS, J.—As originally filed, this was a suit by appellee against appellant on an alleged judgment for \$10 per month as alimony, rendered in a divorce proceeding tried and determined in the circuit court of Jackson county, Missouri, on April 19, 1898.

After the filing of a number of pleadings, and proceedings had thereon, and the issues were closed, appellee, on motion, and after leave granted by the court, amended and filed her complaint in one paragraph, whereby she sought to recover only an allowance from the beginning of this action until the further order of court for the support of the child, Joyce Effie March, whose custody had been awarded to appellee by the Missouri court, and also for a reasonable attorneys' fee for her attorneys in this proceeding. A motion to strike out the words added to the complaint by the way of an amendment was overruled, and appellant filed a demurrer to the complaint, which was also overruled.

Appellant then filed an answer in two paragraphs: (1) General denial, and (2) averring affirmative facts showing that the Missouri court did not have jurisdiction to render a personal judgment against him.

Appellee replied in three paragraphs to appellant's second paragraph of answer. A demurrer to the second and third paragraphs of reply was overruled.

The issues thus joined were submitted to the court for trial. Finding and judgment. After hearing the evidence the court made a general finding in favor of appellee, and that appellant ought to pay appellee \$3 per month from the commencement of this suit until the further order of the court.

Appellant's motion for a new trial was overruled, and judgment rendered against him and in favor of appellee, ordering him to pay to appellee on the tenth day of each month, until the further order of the court, \$3 per month for the support and education of his daughter, Joyce Effie March. This is the substance of the judgment which appellant is seeking to have reversed.

Numerous errors have been assigned, but we will notice only those not waived. First, the complaint is challenged for want of sufficient facts to constitute a cause of action.

On appeal, the presumption is in favor of the proceedings of the trial court, and the burden is on the party alleging error affirmatively to point it out. *Taylor v. Birely*

1. (1892), 130 Ind. 484, 30 N. E. 696; *Hanrahan v. Knickerbocker* (1905), 35 Ind. App. 138, 72 N. E. 1137; *Dillman v. Chicago, etc., R. Co.* (1909), 44 Ind. App. 665, 90 N. E. 22.

Appellant, in support of the error under consideration, has not called our attention to a single omitted fact essential to the recovery awarded in this case. Keeping in

2. mind the rule that an appellate tribunal will not search the record to reverse, but may do so to affirm a judgment, and that appellant, in this case, has failed to show wherein the amended complaint is without facts to make it good, we may at least assume that it contains

3. facts sufficient to bar another action for the same cause, and if so the error cannot be sustained.

It is next insisted that the court erred in overruling the demurrer to each the second and third paragraphs of reply.

We need not stop to investigate these rulings, for the

4. reason that the finding and judgment of the court is not in the least dependent on any issue tendered by either of these paragraphs, or the answer to which they were addressed.

Supporting the motion for a new trial, the point is made on the evidence that it was insufficient to show that the Missouri court had jurisdiction to render a personal judg-

5. ment against appellant. In view of the issues and the decision of the court thereon, the point is not effective or applicable for any purpose. For here the judgment does not rest, in any respect, on the judgment of the Missouri court. The record affirmatively shows that issue was decided in favor of appellant.

After a careful review of the entire record in this case, we are convinced that a fair trial was had, and a correct conclu-

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sion reached by the trial court. This being true, this
 6. court will not disturb the judgment on account of intervening error, which is clearly shown to be harmless.
 §§407, 700 Burns 1908, §§398, 658 R. S. 1881.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 324. See, also, under (1) 3 Cyc. 275; (2) 3 Cyc. 418; (3) 3 Cyc. 286; (4) 31 Cyc. 358; (5) 38 Cyc. 1888; (6) 3 Cyc. 443. As to the rule that the judgment appealed from will be affirmed if possible, see 91 Am. Dec. 195.

BARKER ET AL. v. MCCLELLAND ET AL.

[No. 7,570. Filed April 26, 1912.]

1. **APPEAL.**—*Special Findings and Conclusions of Law.*—*Failure to Except to Findings.*—*Presumption.*—Where appellant excepted to conclusions of law, but failed to question the correctness of the findings of facts, it will be presumed that the facts found are supported by the evidence. p. 301.
2. **PARTNERSHIPS.**—*Settlement.*—*Construction of Bond.*—The effect of a bond executed by a copartner conditioned for the payment to the other partners of any amount found to be due from him on settlement of the partnership affairs, must be ascertained from the language of the instrument as a whole and from the circumstances and conditions existing at the time of its execution. p. 302.
3. **BONDS.**—*Construction.*—*Variation of Terms.*—Where a bond is definite and certain, nothing can be read into it which might in any way vary its terms and conditions. p. 302.
4. **PARTNERSHIPS.**—*Settlement.*—*Separate Contracts.*—*Construction.*—Where the plaintiff and his copartners entered into separate agreements, at one and the same time, to arbitrate their partnership affairs, the plaintiff agreeing to pay to his copartners any sum due them upon settlement and they agreeing to pay plaintiff in the event the settlement showed a sum due to him, such agreements constituted one entire transaction and the court will look to all of them to ascertain their full purpose. p. 302.
5. **PARTNERSHIPS.**—*Settlement.*—*Construction of Bond.*—Where the members of a partnership entered into separate agreements to arbitrate their partnership affairs, within a certain time, but failed to effect a settlement by arbitration, a bond executed by the plaintiff and conditioned to pay to his copartners "on settlement, all sums of money as may be coming to them from the sale of said real estate, and the final closing up of said partnership affairs, * * * with six per cent interest from the time the

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final settlement is made and agreed on by the parties," cannot be construed to include the payment of a judgment rendered against the plaintiff in a settlement of their differences by the court after the failure of the parties to carry out their agreements to arbitrate. p. 302.

6. **PRINCIPAL AND SURETY.—*Liability of Surety.—Bonds.***—The obligation of the surety on a bond cannot be enlarged beyond the strict terms of the engagement. p. 303.
7. **APPEAL.—*Review.—Conclusions of Law.***—In an action to cancel a bond, where it appeared that no present liability existed thereon and that none could arise in the future, the court did not err in its conclusions of law in favor of the plaintiff and in directing a cancelation of the instrument. p. 303.

From Hendricks Circuit Court; *John C. Robinson*, Special Judge.

Action by William R. McClelland against Joel T. Barker and others. From a judgment for plaintiff, certain defendants appeal. *Affirmed.*

Brill & Harvey and *Samuel Ashby*, for appellants.

Enloe & Pattison, for appellees.

IBACH, P. J.—Appellee William R. McClelland brought this suit against appellants and the other appellees to cancel a bond which he, with such other appellees as sureties, had executed to appellants, to secure the payment of certain indebtedness to them, on certain conditions. Appellants filed answer in general denial, and a cross-complaint against appellees on the same bond, to which cross-complaint appellees answered in general denial, want of consideration, and failure of consideration, and to these latter answers appellants replied in general denial.

The cause was tried by the court, who made a special finding of facts, and stated conclusions of law thereon. The facts therein found, essential to the determination of this appeal, follow, in brief: Appellee William R. McClelland and appellants were on January 16, 1903, and had been for some time prior, partners in the ownership and operation of the Cartersburg Mineral Springs property in Hendricks county, Indiana. McClelland was indebted to appellants for

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money advanced by them for him in the partnership business, but was claiming an unsettled account owing from appellants to him, which they disputed. All the partners, being desirous to sell the property, had executed an option to sell to a proposing purchaser, but appellants refused to carry out the option, except on condition that there should be a settlement of the partnership affairs, and McClelland should execute a bond to pay to them whatever might be found due from him to them on settlement.

On January 16, 1903, McClelland, and Barker who was acting with full authority for all of appellants, procured an attorney to draw up three several instruments in writing. The first and second of these follow in full:

“Whereas, there is an unsettled partnership existing between William R. McClelland, Thomas A. Prewitt, Alfred W. Carter, Joel T. Barker, William W. Quinn, growing out of the management of the Cartersburg Mineral Springs, now it is agreed that the settlement of said partnership affairs, if the partners above named can not agree on a settlement, then said McClelland shall choose one arbitrator and the said Prewitt, Carter, Barker and Quinn together shall choose one arbitrator and the differences between said partners shall be submitted to arbitration; and if the two arbitrators so chosen shall not agree then the said arbitrators shall choose a third arbitrator and the decision of a majority shall be binding on each and every one of said partners and the said partnership shall be settled accordingly.

Witness our hands the 16th day of January, 1903.

W. R. McClelland.

W. W. Quinn.

.....

Joel T. Barker.

Alferd W. Carter.”

“Whereas, Thomas A. Prewitt, Alferd W. Carter, Joel T. Barker, William R. McClelland, and William W. Quinn are the owners in fee simple and tenants in common of the farm on which is located the Cartersburg Mineral Springs, and are partners in certain personal property in and about and connected with said Springs and said real-estate, and Whereas, the said

owners are about to sell the real estate, and proceed at once to settle up their partnership affairs in full, adjusting and settling all demands between the said partners. Now, We, William R. McClelland as principal and William H. Nichols and Charles F. McClelland and William L. Wilson as sureties jointly and severally acknowledge ourselves bound to the said Thomas A. Prewitt, Alferd W. Carter, Joel T. Barker, and William W. Quinn, to pay them on settlement all such sums of money as may be coming to them, or either of them, from the sale of said real estate, and the final closing up of said partnership affairs, without relief from valuation or appraisement laws, with 6% interest from the time final settlement is made and agreed upon by the partners. And the said persons bind themselves to use all diligence in the sale of said personal property and the closing up of the partnership affairs. And such partnership affairs shall be finally closed up in ninety days from the date of this bond.

And whereas, there is an unsettled matter between the said William R. McClelland and the said William W. Quinn, now this bond binds the said McClelland to pay the said Quinn the amount he owes him on a settlement of the same.

Witness our hands this 16th day of January, 1903.

Signed:

W. R. McClelland
Chas. F. McClelland
Wm. H. Nichols
W. L. Wilson."

The third instrument was in terms similar to the second, purported to bind appellants to pay to McClelland, on settlement, the sum of money which might be coming to him, and was signed by appellants Barker, Quinn and Carter.

In consideration of the premises, and after the execution of the several instruments above, all the partners conveyed their interests in said lands, and McClelland received, without objection from appellants, the purchase price of his share, and applied it to the payment of his debts owing to Carter, Quinn and Prewitt, which were secured by mortgage on McClelland's interest in said lands.

After the execution of the agreement above set out, the

parties were unable to agree on a settlement, and within ninety days from January 16, 1903, the parties respectively chose an arbitrator, as provided for in said agreement, and within said time these arbitrators met, but were unable to agree on a settlement, and also on a third arbitrator. Thereupon, McClelland and appellants abandoned further attempts to arbitrate, and no arbitration or settlement was consummated, except through the process of suit, as set out below.

Appellants, in a suit for judgment and accounting in their partnership affairs, recovered judgment against William R. McClelland for \$998 and costs, which remains in full force and is unpaid, which embraced all the matters in controversy referred to in the bond herein sued on, and no other matters, and which correctly represented the amount of indebtedness due from McClelland to appellants on the final adjusting of their partnership affairs, as determined by said litigation. Execution on this judgment was returned, "No property found," and McClelland was at the time of execution insolvent, and has been ever since.

The conclusions of law are as follows: (1) That plaintiff McClelland ought to have judgment and decree canceling and holding for naught the bond set out in his complaint; (2) that on the cross-complaint of defendants Barker, Quinn, Carter and Prewitt said cross-complainants are not entitled to recover against defendants thereto, or against any of them; (3) that plaintiff McClelland and defendants McClelland, Nichols and Wilson are entitled to recover judgment for their costs against defendants Barker, Quinn, Carter and Prewitt.

Appellants rely for reversal solely on error predicated in each of the court's conclusions of law. Appellees have assigned as cross-error that the cross-complaint does not state facts sufficient to state a cause of action.

The sufficiency of the complaint has not been questioned.

The gist of its averments is that appellee McClelland and appellants, who were engaged in business as copartners, were in dispute about partnership accounts, and agreed to submit matters to arbitration, and each to execute to the others a bond to pay to the other party the amount found due on settlement; that plaintiff had executed such a bond; that defendants had wholly failed and refused to carry out their part of said agreement, but retained the bond executed by plaintiff, McClelland, and refused to give it up, and he asks that they be directed to surrender the bond that it may be canceled.

Since the exceptions saved by appellants are to the conclusions of law only, and the correctness of the findings of fact is not questioned, it must be presumed that the facts

1. found are supported by the evidence. The ultimate question, then, is, Was the court warranted, on the facts found, in granting to appellee the relief prayed for in the complaint?

Appellee's contention is that the bond was given solely for the purpose of insuring to appellants payment of the sums of money which might be coming to them provided there was a settlement of the partnership affairs by agreement or arbitration, within the specified time, and that it did not insure the payment of a judgment afterward obtained by appellants against said plaintiff. Appellants insist that the bond did include the judgment, and that from the very nature of the bond and the matters with which it was connected, if the settlement was not made by the parties themselves, then it was binding on appellees so far as the judgment of the court found anything due appellants from said plaintiff. This contention is clear from the cross-complaint itself. The evident theory upon which it proceeds is that the persons executing the bond were liable to pay the judgment. The closing paragraph of the cross-complaint is: "Said bond was given as security for the payment of the unpaid balance due from

said William R. McClelland as found in said judgment," and the alleged breach of the bond, on which the cross-complainants seem to rely, is the failure to pay such judgment.

The effect of a bond such as the one before us is to be ascertained from the language used in the instrument taken altogether, and from the circumstances and condi-

2. tions existing at the time of its execution. In short, it must be construed according to the evident intention of the parties, and, in the absence of fraud or mistake, the rights of the contracting parties will be determined by the contract as it is actually written. There is nothing

3. indefinite or uncertain in the bond now under consideration; it appears on its face to be complete, therefore no new obligation or conditions can be added. Courts can only construe contracts entered into by the parties, a contract cannot be made for them, and nothing can be read into their contract which might in any way vary its terms and conditions.

Applying these fundamental principles to the transaction under consideration, What was the purpose for which the bond was given? What are we to conclude was the extent of the obligation assumed by the parties executing it?

On January 16, 1903, the parties entered into separate agreements to arbitrate their partnership affairs, and each to pay to the other the sums found due on settlement, in order to be able to adjust their business affairs, and sell the land held by them as tenants in common. These agree-

4. ments, as set out above, were all prepared and executed at one and the same time, and constitute one entire transaction, and since this is true, we have a right to look to all of them in order to ascertain their full purpose.

To secure a faithful performance of the obligations entered into by William R. McClelland, the bond in suit—the second instrument set out above—was executed. It

5. seems to us that the only construction which could reasonably be placed on this bond is that the parties

thereto intended to be bound by its provisions if the partners could agree among themselves in the adjustment of their differences, or if not among themselves, then by arbitration. The bond begins: "Whereas, the said owners are about to sell said real estate, and proceed at once to settle up their partnership affairs." The portion of the bond fixing the liability of appellees is as follows: "to pay to them on settlement, all such sums of money as may be coming to them, or either of them, from the sale of said real estate, and the final closing up of said partnership affairs, * * * with 6% interest from the time final settlement is made and agreed upon by the partners." We would be wholly unwarranted in holding that the understanding of the parties extended beyond its tenor, and enlarged the evident intention of the parties, so as to include the payment of a judgment rendered by the court. This would be doing nothing less than to make an entirely new contract for them.

Besides, the sureties on this bond are to be protected by the law; their obligations are not to be enlarged beyond the strict terms of their engagements. *Irwin v. Kilburn*

6. (1885), 104 Ind. 113, 3 N. E. 650; *Dunlap v. Eden* (1896), 15 Ind. App. 575, 44 N. E. 560; *Warrum v. Derry* (1896), 14 Ind. App. 442, 42 N. E. 1123.

The trial court has found that the parties themselves could not agree as to the several amounts due each, also that all efforts toward an arbitration were abandoned. These

7. being the only contingencies on the happening of either of which the liability in the bond would arise, and they having failed, then the conclusion must necessarily follow that there was no breach of the bond before the bringing of this action, and no breach of the bond appearing from the facts found, appellants could not recover on their cross-complaint.

It appears not only that no present liability to appellants existed on the bond, but also that none could arise in future, for by its terms it restricted the liability of its signers to

payment of the sums found due from William R. McClelland to appellants on settlement of their partnership affairs by mutual agreement or arbitration within ninety days from its date. On failure and abandonment of mutual agreement and arbitration, when the prescribed time had elapsed, the bond became inoperative, and the court rightly directed it to be canceled.

The conclusions of law are correct on the facts found, and the judgment is affirmed.

NOTE.—Reported in 98 N. E. 300. See, also, under (1) 3 Cyc. 309; (2) 30 Cyc. 707; (3) 5 Cyc. 758; (4) 30 Cyc. 701; (5) 30 Cyc. 708; (6) 32 Cyc. 73. As to compromise and settlement between partners, see 40 Am. St. 564.

BARRETT v. SIPP ET AL.

[No. 7,573. Filed April 26, 1912.]

1. **BILLS AND NOTES.—Action by Heirs.—Complaint.—Sufficiency.—“Only Children.”**—In an action by the heirs at law of a decedent to recover on a promissory note executed to him, where the complaint alleged that no letters of administration had been granted on the estate, that decedent left no widow surviving him and that at the time of his death he left plaintiffs “as his children and only children and only heirs at law” and that they are the owners of the note, the phrase “only children,” in the absence of words of qualification, must be construed to include deceased as well as living children, and the averments were sufficient to show the right of plaintiffs to maintain the action. p. 307.
2. **LIMITATION OF ACTIONS.—Part Payment.—Effect.**—A voluntary part payment on a debt is *prima facie* sufficient to revive the debt, but such *prima facie* case may be rebutted by attendant circumstances inconsistent with such revivor. p. 310.
3. **LIMITATION OF ACTIONS.—Part Payment.—Payment of Interest.**—A payment of interest, like a part payment of the principal on a debt barred by the statute of limitations, will operate as an acknowledgement of the obligation from which a promise to pay may be implied. p. 310.
4. **LIMITATION OF ACTIONS.—Part Payment.—Evidence.**—To recover on a debt claimed to have been taken out of the statute of limi-

- tations by a part payment, it must be shown that the payment was made on account of the debt for which the action is brought. p. 310.
5. **PAYMENT.—*Rights as to Application of Payment.***—A debtor, who owes his creditor on separate debts, may direct his payments to be applied to either, and in the absence of such direction the creditor may apply the payment to such of the debts as he may choose. p. 311.
6. **PAYMENT.—*Payments In Invitum.—Right as to Application.***—The right of a debtor to designate to which of several debts his payment shall be applied does not exist in case of payments *in invitum*, or by process of law, but only where the payment is voluntary. p. 311.
7. **PAYMENT.—*Application.—Intent of Parties.***—Where the debtor pays with one intention and the creditor receives with another, the intent of the debtor will govern as to the application of the payment. p. 311.
8. **PAYMENT.—*Application of Payment by Court.***—Where a debtor makes a payment to one to whom he owes several debts and neither he nor the creditor makes a specific appropriation thereof, the court will apply it according to the equity and justice of the case, having regard first to the intention of the debtor, if it can be gathered from the surrounding circumstances. p. 311.
9. **PAYMENT.—*Question of Fact.***—Payment and the inference of an admission of continued indebtedness which may be drawn therefrom are questions of fact, and not of law. p. 313.
10. **TRIAL.—*Defective Findings.—Venire De Novo.***—A defective attempt in the special findings to cover a material issue by stating items of evidence only instead of the fact which ought to have been found, is ground for a motion for a *venire de novo*. pp. 314. 315.
11. **APPEAL.—*Review.—Special Findings.—Evidentiary Facts.***—Evidentiary facts in special findings furnish no grounds upon which the court can predicate its conclusions of law, and will be disregarded on appeal. p. 314.
12. **PAYMENT.—*Application.—Secret Intent of Debtor.***—The secret intent of the debtor as to which of several debts a payment shall be applied, undisclosed at the time of the payment, and not ascertainable from the facts and circumstances surrounding and connected with the payment when made, does not control in the application thereof. p. 315.

From Superior Court of Vanderburgh County; *Alexander Gilchrist*, Judge.

Action by William W. Sipp and others against Hiram W.

Barrett and another. From a judgment for plaintiff, the defendant Hiram W. Barrett appeals. *Reversed.*

J. R. McCoy and Thomas Duncan, for appellant.

Louis T. Shanner, J. M. & S. L. Vandever, Funkhouser & Funkhouser, for appellees.

HOTTEL, J.—This was an action brought by appellees against appellant and William C. Barrett, to recover on a promissory note executed by appellant and others. From a judgment in favor of appellees this appeal was taken, and the following alleged errors are relied on for a reversal: That the court erred (1) in overruling appellant's demurrer to the amended complaint; (2) in its second and third conclusions of law on the special finding of facts; (3) in overruling appellant's motion for a *venire de novo*; (4) in overruling appellant's motion for a new trial.

Appellee's amended complaint is, in substance, as follows: That on January 1, 1889, Samuel G. Barrett, William C. Barrett and appellant executed and delivered to John Sipp, father of appellees, a certain promissory note, which is set out as an exhibit with the complaint; that on July 17, 1907, said John Sipp died intestate, and at the time of his death was owner of and had in his possession said note; that all debts and claims against said John Sipp at the time of his death, and all claims against his estate have been paid in full by appellees; that no letters of administration have been granted on said estate; that he left no widow surviving him, and that at the time of his death he left appellees "as his children and only children and only heirs at law"; that appellees are the owners of said note; that said Samuel G. Barrett died intestate, and said note was filed against his estate; that said estate was wholly insolvent, and nothing was paid on said note; that certain payments, indicated on the back of said note, have from time to time been made, but there yet remains due and unpaid thereon, principal and

interest, the sum of \$750 and attorney's fees, for which judgment is prayed.

Appellant contends that the averment in the complaint, that the decedent, John Sipp, left appellees "as his children and only children and only heirs at law" does not

1. supply the omission of an averment that said John Sipp left surviving him appellees who are his children and that he left surviving him no other children or descendants of other children. While it is true that some of the cases cited and relied on by appellant hold, in effect, that a recital that a party is the "only heir at law" of another, standing alone, is but a conclusion, yet the Supreme Court, in the case of *Physio-Medical College, etc., v. Wilkinson* (1886), 108 Ind. 314, in discussing an allegation of a complaint similar to that here involved at page 316, said: "The averment that the plaintiffs are the heirs of the intestate, it is said, is but the statement of a conclusion of law. We do not concur in this view. It was equivalent to a statement of the fact, that the appellees stood in such relationship of kinship to Margaret Wilkinson, as that at her death the law of descents cast her estate upon them. If the appellant had deemed it important that the degree of consanguinity or affinity, relatively occupied by the deceased and the plaintiffs, should appear more in detail, a motion to make the complaint more specific might, with propriety, have been entertained." It is true that in the case quoted from, the attack on the complaint was first made by assignment of error in that court, but Judge Mitchell in the opinion does not limit or qualify his words quoted to an attack on the complaint so made. But even if it should be conceded that the language quoted should not be extended in its application so as to apply to a complaint first attacked by demurrer, yet there are other facts alleged in this complaint which indicate clearly that the plaintiffs are the only heirs at law, and in such case such averment, though a conclusion, does not vitiate the pleading.

In the complaint at bar it is averred that said John Sipp died intestate, that he left no widow, and that he left appellees as his children and only children, that all debts and claims against decedent and his estate had been paid, and that no letters of administration had been granted on said estate. The phrase "only children," in the absence of words of qualification, must be construed to include deceased, as well as living children. It is also averred in this complaint that appellees are the owners of said note. Considering these averments together, we think they are sufficient to show the right of plaintiffs to maintain the action. *Louisville, etc., R. Co. v. Kendall* (1894), 138 Ind. 313, 318, 319, 36 N. E. 415; *Evansville, etc., R. Co. v. Darting* (1893), 6 Ind. App. 375, 33 N. E. 636; *Byard v. Harkrider* (1886), 108 Ind. 376, 378, 9 N. E. 294; *Douthit v. Moore* (1889), 116 Ind. 482, 484, 18 N. E. 449.

In its special finding of facts the court, in effect, found the allegations of the complaint to be true. The part of the finding important in the consideration of the questions presented by the appeal is, in substance, as follows: For a number of years before January 2, 1899, and until after said date, appellant was indebted to said John Sipp on two notes of \$500 each, which were made by appellant and William C. Barrett, and on which notes appellant was the principal debtor; that appellant was also indebted during said time to said John Sipp on a note of \$1,500, made by himself alone, and which note was secured by a mortgage on real estate; that on each of these notes appellant made payments at different times, which were indorsed by said John Sipp on said notes as follows: "The following payments of interest upon said note (in suit) were made, namely, interest upon the same in full to January 1, 1893, and thereafter the following payments of interest, namely, October 18, 1896, \$60; February 18, 1897, \$16; January 14, 1898, \$50; October 19, 1898, \$50." Some of these later payments of interest on this note were made by appellant, Hiram W. Barrett; that

on the note here sued on, Samuel G. Barrett, who was the father of appellant, was the principal, and appellant and William C. Barrett were sureties on the same for said Samuel G. Barrett, but there was no evidence that said John Sipp at any time knew who was the principal debtor or who were the sureties on said note; that on January 2, 1899, appellant sent to John Sipp by letter, which was mailed to said John Sipp and was received by him, a check for \$107.85, made by another person to the order of appellant, and which check was duly indorsed by appellant when it was sent to John Sipp; that in the letter which was enclosed with said check, appellant directed John Sipp to place the amount of said check to his credit, and gave no other direction in said letter or in any other way to said John Sipp as to the application of the amount of said check; that said John Sipp thereupon received the full amount of \$107.85 of said check from its maker, and on January 2, 1899, said John Sipp applied of the \$107.85, \$16 on the note here sued on, and at the same time said John Sipp caused to be made the following indorsement on said note: "Rec'd \$16.00 Jan. 2d, 99 H. W. Brt. Int. in full to January 1, 99"; that such payment of \$16 paid the interest in full on said note to January 1, 1899; that said direction by appellant to said Sipp to place the check of \$107.85 to the credit of appellant was an authority to said Sipp to apply said check, or any part of the same, on the note in suit in this action; that there is due and unpaid on said note \$400, and interest at the rate of eight per cent. per annum from January 1, 1899; that defendant, William C. Barrett, had at no time made any payment on the note in suit, nor in any way recognized its binding force; that a reasonable attorneys' fee on the note in suit is \$63.45. On the above facts the court announced the following conclusions of law: "(1) The defendant William C. Barrett is entitled to a judgment that the plaintiffs take nothing by their action against him. (2) The payment of the \$16 upon

the note in suit on the second day of January, 1899, was effectual to make the note in question in this action a continuous contract from said date as to the defendant Hiram W. Barrett. (3) The plaintiffs are entitled to a judgment against the defendant Hiram W. Barrett for \$746 for principal and interest and the further sum of \$63.45 for attorney fees and in all the sum of \$809.45 the same to be without relief from valuation or appraisement laws of the State of Indiana and it is so ordered.”

The underlying principles applicable to the questions raised by appellant's second and third errors relied on and set out, *supra*, as declared by the Supreme Court and this

court, are as follows: (1) “A voluntary part pay-

2. ment upon a debt, made as such, is *prima facie* sufficient to revive the debt, although such *prima facie* case may be rebutted by attendant circumstances inconsistent with such revivor.” *Christian v. State, ex rel.* (1893), 7 Ind. App. 417, 423, 34 N. E. 825. See, also, *Wiley v. State, ex rel.* (1886), 105 Ind. 453, 5 N. E. 884; *Brudi v. Trentman* (1896), 16 Ind. App. 512, 44 N. E. 932.

(2) “Part payment of the principal and payment of interest stand on the same footing. Payment is regarded as an acknowledgment of an existing obligation and from

3. such acknowledgment a promise to pay the debt may be implied.” *Meitzler v. Todd* (1895), 12 Ind. App. 381, 382, 39 N. E. 1046, 54 Am. St. 531. See, also, *Conwell v. Buchanan* (1845), 7 Blackf. 537.

(3) “In order to take a case out of the statute of limitations by a part payment, it must appear, in the first place, that the payment was made on account of the debt.

4. secondly, it must appear that it was made on account of the debt for which the action is brought.” *Prenatt v. Runyon* (1859), 12 Ind. 174, 178.

On this subject the Supreme Court, in the case of *Carlisle v. Morris* (1857), 8 Ind. 421, 423, said: “An admis-

sion of continued indebtedness may be inferred from the fact of part payment; but the court is not allowed to imply such admission as an inference of law. It must be left to the jury. It is only *prima facie* evidence, and may be rebutted by other evidence, and by the circumstances under which it was made. Further, in order to take a case out of the statute by a part payment, *it must appear that the payment was made on account of the debt for which the action is brought.*" To the same effect see *Brudi v. Trentman, supra*; *Mozingo v. Ross* (1898), 150 Ind. 688, 690, 691, 50 N. E. 867, 41 L. R. A. 612, 65 Am. St. 387.

(4) "A debtor who owes his creditor money on distinct and separate accounts, or debts, may direct his payments to be applied to either, as he pleases. If the debtor omits

5. to make any such appropriation, then the creditor has the right to apply the payments to such debts, due to him by the debtor, as he may choose." *Conduitt v. Ryan* (1891), 3 Ind. App. 1, 6, 29 N. E. 160. See, also, *Dungan v. Dollman* (1878), 64 Ind. 327.

(5) "The right of appropriation by the debtor

6. applies, however, only to voluntary payments, and does not exist in case of payments *in invitum*, or by

7. process of law. * * * And if the debtor pay with one intention and the creditor receive with another, *the intent of the debtor must govern.* *Reed v. Boardman*

[1838], 20 Pick. 441. * * * If neither party make

8. a specific appropriation of the money paid, then the law will apply it, in the language of Judge Story: 'According to its own notion of the intrinsic equity and justice of the case.' *Cremer v. Higginson* [1817], 1 Mason 323; 2 Parsons, Contracts 630. (6) When the duty of making the appropriation is thus imposed on the courts, the first question always is, *what was the intention of the debtor*, for although he may have made no express declaration upon the subject, yet *if his intention can be gathered from the surrounding circumstances of the case it must prevail.*" *Con-*

duitt v. Ryan, supra. See, also, *Adams Express Co. v. Black* (1878), 62 Ind. 128. (Italics in above quotation ours.)

On this last proposition this court, in the case of *Conduitt v. Ryan, supra*, on page 8, said: “In *Emery v. Tichout* [1841], 13 Vt. 15, the court said that in performing the duty of making the appropriation the courts have not always followed a uniform rule, but that ‘there is one rule which is clear, that is, whenever the intention of the parties at the time can be ascertained that will govern if it be not unlawful.’ ”

These conditions are important, in view of the rule that the appropriation may be implied from circumstances as well as by words. *Howland v. Rensch* (1844), 7 Blackf. 236; *Bayley v. Wynkoop* (1849), 5 Gilman (Ill.) 449.

In *Taylor v. Sandiford* (1822), 7 Wheat. 13, 5 L. Ed. 384, Chief Justice Marshall said: “ ‘A payment may be attended by circumstances which demonstrate its application, as completely as words could demonstrate it.’ It is plain that circumstances may furnish an equivalent to a declaration of appropriation.”

On the same question the Supreme Court of this State, in the case of *Dungan v. Dollman, supra*, said: “The general rule in regard to the application of payments seems to be well established, that the payor and debtor owing two or more debts to the same creditor or payee, may direct the application of any payment made, as he may elect, to either of his said debts. It is not absolutely necessary in such a case, that the appropriation of the payment should be made by an express declaration of the debtor; for if his purpose and intention, as to the application of the payment, could be clearly gathered from the attendant circumstances, the creditor would be bound thereby, even in the absence of an express direction. *Adams Express Co. v. Black* [1878], 62 Ind. 128.”

(7) Payment and the inference of an admission of continued indebtedness which may be drawn therefrom are ques-

tions of fact, and not of law. *Mozingo v. Ross, supra*;
9. *Christian v. State, ex rel., supra*, 423; *Binford v. Adams* (1885), 104 Ind. 41, 43, 3 N. E. 753; *Braden v. Lemmon* (1891), 127 Ind. 9, 13, 14, 26 N. E. 476; *Carlisle v. Morris, supra*, 423; *Belshaw v. Chitwood* (1895), 141 Ind. 377, 378, 382, 40 N. E. 908; *Bradway v. Groenendyke* (1899), 153 Ind. 508, 512, 513, 55 N. E. 434.

The case of *Braden v. Lemmon, supra*, is an authority in point on this question, and applicable to this particular case. The Supreme Court in that case said: "The real controversy between the parties relates to the effect of the special finding above referred to, the appellant contending that payment is an ultimate fact to be found by the court, while it is contended by the appellees that payment is a conclusion of law to be deduced from a given state of facts. Mr. Thompson, in his work on Trials, vol. 1, §1253, says: 'There is no rule of law as to what is or as to what is not payment. Payment is simply the doing of what a man has agreed to do. *It is, therefore, a pure question of fact*; and where a man has agreed to pay, and tenders what he understands to be performance of his agreement, and the other party accepts it, it is a naked question of fact and intent, whether it was accepted as performance. In every such case the ultimate point of inquiry does not touch a rule of law, but stops at a conclusion of fact.' As applied to this case we fully concur in what Mr. Thompson says upon this subject. Payment is a question of fact, and not one of law. It will be observed that in what purports to be the special finding of facts, there is no direct finding that any portion of the note set up in the cross-complaint has been paid. The facts found by the court are evidential facts tending strongly, no doubt, to prove that the money collected by Prickett on the Lemmon judgment was intended by the parties as a payment on the note in suit; *but the ultimate fact of payment is not stated in the special finding of facts*. It is stated, however, as a conclusion of law. * * * The question, therefore, is, shall we

reject the finding of the ultimate fact of payment, because it is stated as a conclusion of law, and not as a statement of fact. The question here presented does not seem to be open to argument. In the case of *Kealing v. Vansickle* [1881], 74 Ind. 529 [39 Am. Rep. 101] it was held that if, in the special finding, items of evidence only are stated, instead of the facts which ought to be found, and if the statement of the legal conclusions embraces matters of law, and also matters of fact which ought to have been found as such, a *venire de novo* should be granted. * * * The special finding is defective in failing to find the fact of payment, the ultimate fact in issue between the parties.” (Our italics.)

(8) A defective attempt to cover the issue of payment, where such issue was a material one, by stating items of evidence only, instead of the fact which ought to be found, furnishes ground for a motion for a *venire de novo*. *Braden v. Lemmon, supra*; *Bradway v. Groenendyke, supra*; *Swift v. Harley* (1898), 20 Ind. App. 614, 618, 49 N. E. 1069.

Evidentiary facts found in special findings furnish no grounds on which the court can predicate its conclusions of law, and will be disregarded on appeal. *Bradway v. Groenendyke, supra*; *Braden v. Lemmon, supra*; *Craig v. Bennett* (1897), 146 Ind. 574, 45 N. E. 792; *Binford v. Adams, supra*; *Belshaw v. Chitwood, supra*.

The foregoing authorities, and the quotations therefrom make it clear that a *voluntary* part payment on an existing debt is *prima facie* sufficient to revive such debt and start anew the statute of limitation upon the theory that such payment is in the nature of an admission or acknowledgment by the debtor of “his liability, for the whole demand, and, from the fact that he made the payment a new promise on his part to pay the remainder of the debt may be implied.”

It is also made clear by these authorities that to start anew the running of the statute, it must appear that the payment relied on was *voluntary*; that it was made on account

of the debt for which the action is brought; that at most such payment is "only prima facie evidence" of such revival of the debt and may be rebutted by other evidence, and "by attendant circumstances inconsistent with such revivor"; that "if the debtor pay with one intention and the creditor receive with another, the intent of the debtor must govern."

It must not be understood, however, from the expression just quoted, that the secret intent of the debtor, undisclosed at the time of payment, shall govern or control, but where from all the facts and circumstances surrounding and connected with the payment when made, the debtor's intent so disclosed, can be ascertained, it shall control, rather than the intent of the creditor. This is true as to payments generally made by a debtor to a creditor who holds two or more obligations of such debtor, and being true under such circumstances, there is much stronger reason for the application of the rule under circumstances where the debts held by the creditor are those of the debtor's own making on which he is primarily liable, and those made by some one else on which he is only secondarily liable.

We think we have indicated the law applicable to the facts of this case as expressed by the Supreme Court and this court. Under our view of the case, we deem it unnecessary to express any opinion on the question of what the evidence or the findings show on the subject of payment. Under the authorities cited, it is settled that the question of part payment and the admission of indebtedness that may be inferred therefrom, is a question of fact and not of law. No

10. such fact is found in this case, but on the contrary, the court sets out the evidentiary facts on which the existence or nonexistence of such ultimate fact might be based. Under the authorities, these evidentiary facts must be ignored by this court, and without them the second and third conclusions of law have nothing for their support.

Inasmuch as the court below made a "defective attempt to cover the issue of payment the order should be to grant a

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venire de novo.” *Bradway v. Groenendyke, supra*, and other authorities on this question heretofore cited.

We think the court below should have sustained appellant’s motion for a *venire de novo*, and for error in overruling the same the judgment is reversed, with instructions to the court below to sustain such motion, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 98 N. E. 310. See, also, under (1) 14 Cyc. 152; (2) 25 Cyc. 1369; (3) 25 Cyc. 1373; (4) 25 Cyc. 1433; (5) 30 Cyc. 1228, 1233; (6) 30 Cyc. 1228; (7) 30 Cyc. 1240; (9) 25 Cyc. 1437; 30 Cyc. 1294; (10) 38 Cyc. 1921; (11) 3 Cyc. 347; (12) 30 Cyc. 1231, 1240. For a discussion of the application by a creditor of an undirected payment to a debt barred by limitation as reviving the unpaid portion, see 13 Ann. Cas. 1203. As to the directing by a debtor of the application of his payments, see 96 Am. St. 46. On the question of the revival of a barred debt by application of general payment, see 13 L. R. A. (N. S.) 1141.

ESSEX ET AL. v. HOPKINS ET AL.

[No. 7,555. Filed April 26, 1912.]

1. APPEAL.—*Review.*—*Harmless Error.*—*Ruling on Demurrer for Misjoinder of Causes.*—Under the provisions of §346 Burns 1908, §341 R. S. 1881, erroneously sustaining a demurrer for misjoinder of causes of action is not cause for reversal. p. 320.
2. DEEDS.—*Conveyance to Trustees of Church.*—*Construction.*—*Estate Conveyed.*—A conveyance to named persons, designated as the trustees of the parsonage of a ministerial charge, and their successors in office, “in trust for the use and benefit of the ministry and membership of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage and ministerial appointments of said church,” and providing for disposition of the proceeds, in the event of sale, in accordance with said discipline, does not give to either of the churches composing such ministerial charge any legal estate or interest in the property conveyed. p. 321.
3. DEEDS.—*Execution.*—*Merger of Previous Negotiations.*—Upon the execution of a deed, all previous negotiations in reference thereto, whether parol or written, are merged therein and the terms of the deed will control. p. 321.
4. TRUSTS.—*Resulting Trusts.*—*Acts of Church Officers.*—Where two churches constituted one ministerial charge, each having its

own board of trustees and local officers who constituted the quarterly conference of the charge, and such officers, sitting as the quarterly conference, decided on the purchase of a new parsonage, recommending the amount to be paid by each church and that the property should belong to the two churches jointly, such action did not amount to a contract between the two churches so as to cause the conveyance, taken in the names of persons designated as trustees of the parsonage of the charge for the use and benefit of the ministry and membership of the church in the United States, to operate as a resulting trust in favor of said two churches under the provisions of §4019 Burns 1908, §2976 R. S. 1881, excepting certain cases from the provisions of §4017 Burns 1908, §2974 R. S. 1881, that no trust shall result in favor of one paying the consideration for a conveyance made to another. p. 322.

5. RELIGIOUS SOCIETIES.—*Corporate Powers.—Acts of Trustees.*—Under the provisions of §4984 Burns 1908, §3824 R. S. 1881, the trustees of a religious society are a body politic and corporate under the name and style of the society, whose acts as a board are binding on the society, but they cannot bind it by their individual action. p. 323.

From Bartholomew Circuit Court; *Marshall Hacker*, Judge.

Action by Thomas Essex and others as trustees of the Methodist Episcopal Church of Old St. Louis against Dennis C. Hopkins and others as trustees of the Methodist Episcopal Church of Hope and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

John W. Donaker and *Ralph H. Spaugh*, for appellants.

Francis T. Hord and *James F. Cox*, for appellees.

LAIRY, J.—This action involves a controversy between the trustees of the Methodist Episcopal Church of Old St. Louis and the trustees of the Methodist Episcopal Church of Hope.

At the time of the transactions out of which this litigation arises, the Hope church and the Old St. Louis Church constituted one ministerial charge, known as the "Hope charge." Each church had its own board of trustees and local officers, and transacted its own business affairs, and the local officers for the two churches constituted the quarterly conference

and also the official board of the Hope charge, which transacted the business of said charge.

The facts as gathered from the complaint, are substantially, as follows: In November, 1897, at a meeting of the quarterly conference, a committee was appointed to devise some plan for the improvement of the parsonage of such charge, and at the next meeting of the quarterly conference, held in February, 1898, this committee made a report in writing, in which it recommended the sale of the old parsonage, and the purchase of a lot and the erection of a new parsonage thereon. In the report it was estimated that the purchase of the lot and the erection of the new parsonage, as planned, would cost \$1,600, and that the old parsonage could be sold for \$400, leaving a balance of \$1,200 to be raised by the two churches. The report recommended that the Old St. Louis church pay \$300 of this amount and that the Hope church pay the remainder. The report concluded with the language following: "In view of the foregoing division of one-fourth and three-fourths of the expense and to make all parties safe we offer the following: Resolved: that the parsonage property belong jointly to the Old St. Louis and Hope churches. The Old St. Louis claim to cover one-fourth its value and Hope the other three-fourths. We recommend that subscriptions be made payable as follows: One-fourth on or before September 1st, 1898, and the other half on or before January 1st, 1899, and that the Parsonage Trustees with the Pastor and a committee of one from each of the points shall constitute the soliciting committee."

This report was adopted by the quarterly conference and in pursuance thereof a building committee was appointed, which purchased a lot and erected a parsonage thereon. The deed to the property was taken to "Samuel P. Hitchcock, Logan T. Chitty and Thomas Dodd, Trustees of the M. E. Parsonage of Hope, Indiana Charge and their successors in office, in trust for the use and benefit of the ministry and

membership of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage and ministerial appointments of said church as from time to time authorized and declared and, if sold, the proceeds shall be disposed of and used in accordance with the provisions of said discipline.”

The church of Old St. Louis contributed and paid toward the purchase of said lot and the erection of the building thereon more than \$500, and the property so provided was occupied and used as a parsonage by the minister of Hope charge continually until November 8, 1906, during all of which time the Hope charge consisted of the Hope church and the church of Old St. Louis. On November 8, 1906, a meeting of the quarterly conference and of the official board of Hope charge was held and presided over by the presiding elder of the district. By the action of this meeting the Hope church was made a separate ministerial charge and the society of Old St. Louis was separated therefrom. This separation was agreed to by the members of the quarterly conference and the official board who were present from and representing the Old St. Louis society, on the condition that the society which they represented should be paid by the Hope society the value of the one-fourth interest which it claimed in the parsonage property. This arrangement was agreed to by the members of the quarterly conference and the official board representing the Hope society, and a motion was made and unanimously adopted at said meeting to the effect that the Hope pastoral charge be dissolved and that the Hope society pay the Old St. Louis church society for its fourth interest in the parsonage property. A committee was appointed at this meeting consisting of one member from the Old St. Louis church society, and two members from the Hope church society for the purpose of appraising the one-fourth interest in said parsonage property, in pursuance of said motion; but the members of the committee from the

Hope society refused to act with the members from Old St. Louis society, and have failed and refused to fix the value of said property or the one-fourth interest thereof.

The Hope society after November 8, 1906, took possession of the parsonage property, and has ever since held, and still holds the same, and has always refused, and still refuses to pay to the Old St. Louis church the one-fourth value of said property, or any part thereof.

The complaint is in two paragraphs. The first sets out in detail the facts heretofore recited, and avers that appellants, as trustees of the Old St. Louis church society, are the owners of the undivided one-fourth interest in the real estate described, and defendants are the owners of the undivided three-fourths thereof; that the property is of the value of about \$2,500, and is undivisible. The relief asked is that appellants be declared the owners of the undivided one-fourth interest in said property; that it be declared undivisible, and ordered sold; and that the proceeds be ordered to be distributed one-fourth to appellant and three-fourths to appellee.

The second paragraph states practically the same facts as the first, with the exception of the averments on the subject of partition. This paragraph alleges that the one-fourth interest in said real estate is of the value of \$750, and concludes with a prayer for judgment in that amount.

Appellees filed a demurrer to the complaint as a whole, on the ground that the two causes of action were improperly joined, and also filed a separate demurrer to each paragraph of complaint, on the ground that neither of such paragraphs stated facts sufficient to constitute a cause of action. All these demurrers were sustained, and appellants refusing to amend or plead further judgment was rendered against them, from which this appeal is prosecuted.

The action of the court in sustaining the demurrer to the complaint as a whole, on the ground that two causes of

1. action were improperly joined, presents no reversible error. Even if two causes of action were improperly

joined, such a ruling would be harmless, as the only effect would be to require that the separate paragraphs of complaint be docketed as distinct actions. §346 Burns 1908, §341 R. S. 1881; *Langsdale v. Woolen* (1889), 120 Ind. 16, 21 N. E. 659; *Miller v. Evansville Nat. Bank* (1884), 99 Ind. 272.

In this case the court also sustained the separate demurrer to each paragraph of complaint, and rendered judgment against appellants on the merits. This requires us to consider the sufficiency of each paragraph of complaint.

Under the terms of the deed it is clear that neither of said churches has any legal estate or interest in said parsonage property. The legal title is held by the parsonage

2. trustees in trust for the use and benefit of the ministry and membership of the Methodist Episcopal Church in the United States of America.

No express trust in the real estate in question or any part thereof was created by the deed in favor of appellants, but, on the contrary, an express trust was created in favor of the ministry and membership of the Methodist Episcopal Church in the United States of America. When a deed has

3. been executed, all previous negotiations in reference thereto, whether parol or written, are merged therein. If there are any inconsistencies between the original terms of the agreement and the deed, the terms of the deed will control. *Phillbrook v. Emswiler* (1884), 92 Ind. 590; *Turner v. Cool* (1864), 23 Ind. 56, 85 Am. Dec. 449; *Smith v. McClain* (1896), 146 Ind. 77, 45 N. E. 41.

It is claimed on behalf of appellants that, under the averments of the first paragraph of complaint, a trust was created by operation of law, known as an implied or resulting trust, by which the trustees of the parsonage held the title thereto in trust, one-fourth for the church society of Old St. Louis and three-fourths for the church society of Hope.

Section 4017 Burns 1908, §2974 R. S. 1881, provides that

“When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections.” The next section does not relate to cases such as the one under consideration, but §4019 Burns 1908, §2976 R. S. 1881, provides that the provisions of the section just referred to shall not extend to three classes of cases expressly designated, viz.: (1) When it appears that the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid; (2) when such alienee, in violation of some trust, shall have purchased the land with money not his own; (3) when it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall rest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof.

Appellants do not seriously contend that the facts pleaded show a resulting trust under the first or second provision of §4019, *supra*, but they claim that the facts pleaded do show: (1) that the purchase money for the parsonage was furnished by the two church societies in the proportion of one-fourth and three-fourths; (2) that the conveyance was made to and the title vested in the trustees of the Methodist Episcopal parsonage of Hope charge; (3) that such conveyance was made under an agreement entered into in good faith, and without any fraudulent intent, between the two church societies, by the terms of which the parsonage trustees were to hold such real estate in trust, one-fourth for the Old St. Louis church society and three-fourths for the Hope church society. Such a state of facts is sufficient to show a resulting trust. We think, however, that the facts pleaded fail to show that any agreement was entered into between the two church societies, to the effect that the parsonage property

was to be held by the parsonage trustees in trust for such church societies or either of them.

The report of the committee, together with the resolution forming a part thereof, which was adopted by the quarterly conference, does not amount to such a contract. From the facts pleaded, it does not appear that either the quarterly conference or the official board had any power to make a contract for the two churches that would be binding on either of them. Each church society had its own board of trustees. These trustees had power to act for the church organization which they represented when met as a board for that purpose, and the pleading fails to show that the board of trustees, or either of the church societies interested, took any action or made any agreement whatever in reference to

the parsonage or to the manner in which the title

5. should be taken or held. Section 9 of the act touching societies and lodges provides that the trustees thereof shall be deemed a body politic and corporate, under such name and style as the society may elect, and under that name shall have power to contract and sue, be contracted with and sued with like effect as other persons or corporations. §4984 Burns 1908, §3824 R. S. 1881. See, also, *Board, etc., v. Shulze* (1878), 61 Ind. 511.

The trustees of a church cannot, by their individual action, bind the organization which they represent. Their acts are binding on the organization only when they meet and act as a board. *First Presbyterian Church, etc., v. McColly* (1906), 126 Ill. App. 333; 8 Current Law 1719.

There is no averment in the complaint that the board of trustees of the church society of Hope and the board of trustees of the church society of Old St. Louis entered into any contract with each other or with the board of parsonage trustees to the effect that the title to the parsonage property should be held in trust for either of said church societies. It does not appear from the averments that there was any provision of the church discipline giving to the quarterly

conference or to the official board power to bind, by their action, the various church societies comprising the ministerial charge. As the quarterly conference had no power by its action to bind the church societies comprising the ministerial charge, we must hold that the action of the quarterly conference, in accepting the report and adopting the resolution relied upon by appellants, was acting simply in an advisory capacity. As the suggestion was never embodied in a contract between the two church societies, nor carried forward into the deed, it must be presumed that it was abandoned. No trust, either express or implied in favor of either of the church societies, is shown by the averments of the first paragraph of complaint. This paragraph, therefore, does not state facts sufficient to constitute a cause of action for partition.

Enough has been said to show that the quarterly conference had no authority to bind the church society of Hope to pay to the other church society of Old St. Louis the value of one-fourth of the parsonage property.

It must follow that the second paragraph of complaint was also insufficient, and the court did not err in sustaining a demurrer thereto.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 307. See, also, under (1) 31 Cyc. 358; (2) 34 Cyc. 1153, 1157; (3) 17 Cyc. 613; (4) 39 Cyc. 121; (5) 34 Cyc. 1134. As to contests between factions in a church regarding church property, see 100 Am. St. 745.

TEMPLER v. MUNCIE LODGE, I. O. O. F.

[No. 7,524. Filed February 23, 1912. Rehearing denied May 7, 1912.]

1. LANDLORD AND TENANT.—*Lease.—Construction.*—A lease is construed in the light of the statutes on the subject of landlord and tenant (§8053 *et seq.* Burns 1908, §5207 *et seq.* R. S. 1881) which are regarded as if written into and constituting a part of the contract. p. 328.

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2. LANDLORD AND TENANT.—*Lease.—Termination.*—A lease for a specified term will continue until the expiration of the time named, unless it is sooner terminated in accordance with the provisions of the statutes, or in accordance with some provision of the lease itself, or by agreement of the parties. p. 328.
3. LANDLORD AND TENANT.—*Lcase.—Termination.—Rent Payable in Advance.—Statute.*—Under §8059 Burns 1908, §5213 R. S. 1881, where a lease provides for payment of rent in advance, a failure to pay the rent in advance when due terminates the lease at the election of the lessor, and he may bring an action for possession without notice and without demand for either the rent or possession. pp. 328, 329.
4. LANDLORD AND TENANT.—*Lease.—Termination.—Rent Not Payable in Advance.—Notice.*—Where a lease contains no provision for the payment of the rent in advance, and does not provide a forfeiture for such failure, a failure to pay does not *ipso facto* terminate the lease, but it will terminate by operation of §8057 Burns 1908, §5211 R. S. 1881, in case the rent is not paid within ten days after giving notice as therein provided. p. 328.
5. LANDLORD AND TENANT.—*Lease.—Termination.—Provision for Forfeiture.—Rent Not Payable in Advance.—Demand.*—Where the rent is not payable in advance under a lease providing for a forfeiture for failure to pay the rent when due, the lessor may declare a forfeiture under the terms of the lease after first demanding the rent upon the leased premises, unless some other place of payment is stipulated, just before sunset on the day the rent is due. p. 329.
6. LANDLORD AND TENANT.—*Lcase.—Forfeiture.—Construction.*—A provision for the forfeiture of a lease on failure to pay rent is a sort of condition subsequent, and is strictly construed. p. 329.
7. LANDLORD AND TENANT.—*Lease.—Waiver of Forfeiture.—Answer.—Sufficiency.*—In an action for possession of leased premises for failure to pay rent, where the answer admitted the possession under a lease providing a forfeiture for failure to pay the rent monthly in advance and admitted the nonpayment of the rent due on each the first days of March and April immediately preceding the time of demanding possession, but averred that plaintiff had never theretofore, during the entire period of the lease, demanded payment monthly in advance and that defendant had never paid the rent monthly in advance and had often delayed the payment for a period of three months or more, and that by reason of plaintiff's acceptance of such payments defendant had been led to believe that plaintiff would not insist upon a forfeiture for failure to pay monthly in advance, the allegations were insufficient to show a waiver of plaintiff's right

to terminate the tenancy for failure to pay the rent admitted to be due. pp. 330, 333.

8. **WAIVER.—Acts Constituting.**—Either the intentional relinquishment of a known right or advantage that might have been insisted upon, or such conduct as warrants an inference of such relinquishment, will constitute a waiver thereof. p. 333.
9. **ESTOPPEL. — Waiver. — Distinction.** — While a person cannot waive a right before he is in a position to assert it, he may be estopped from asserting the right by words and conduct causing other persons relying thereon to act in such a way as to place them at a disadvantage. p. 333.
10. **LANDLORD AND TENANT.—Lease.—Estoppel of Landlord to Claim Forfeiture for Nonpayment of Rent.**—Where the conduct of a lessor is such as to be reasonably calculated to induce the lessee to believe that he will not insist on the forfeiture of the lease for failure to pay rent when it becomes due, and the lessee by reason thereof, does so believe in good faith, and relying thereon suffers a default to occur when otherwise he would not have done so, the lessor will be estopped from asserting the right to terminate the lease on account of such default. p. 334.
11. **LANDLORD AND TENANT.—Forfeiture of Lease.—Estoppel of Landlord.—Answer.—Sufficiency.**—An answer showing a course of conduct by plaintiff well calculated to mislead defendant and cause him to believe that plaintiff did not at any time intend to insist on its right to terminate the lease for failure to pay rent when due, and averring that defendant did so believe, was insufficient on the ground of estoppel for failure to aver that defendant's default was due to a reliance in the belief thus induced. p. 335.
12. **LANDLORD AND TENANT.—Forfeiture of Lease.—Estoppel of Landlord.—“Cross-complaint”.—Sufficiency as Defense.**—A pleading filed by defendant in an action for possession of premises for default in payment of rent, which contained averments sufficient to show that plaintiff was estopped from terminating the tenancy because of such default, was sufficient to constitute a cause of defense, although it was designated as a cross-complaint. p. 335.
13. **PLEADING.—Character of Pleading.—Allegations.**—The character of a pleading will be determined from the facts averred therein, and not from the name given to it by the pleader. p. 336.
14. **PLEADING.—Prayer.—Determination of Relief Sought.**—A prayer for relief is not decisive, but the relief to which a party is entitled under a pleading must be determined from its material averments. p. 336.

From Jay Circuit Court; *John F. LaFollette*, Judge.

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Action by Muncie Lodge, I. O. O. F., against Clayton B. Templer. From a judgment for plaintiff, the defendant appeals. *Reversed.*

W. A. Thompson and *R. W. Sprague*, for appellant.

J. Frank Mann and *Snyder & Smith*, for appellee.

LAIRY, J.—This action was brought in the trial court to recover possession of certain real estate held by appellant as a tenant of appellee, on the ground that the lease under which appellant held had been terminated or forfeited by a failure to pay rent when due.

As shown by the complaint, plaintiff on December 20, 1900, leased to defendant three office rooms on the second floor of a brick building in the city of Muncie, for a period of five years, with the privilege to defendant of extending the lease for another like period from and after the date of its expiration. By the terms of said lease the rent was payable in advance on the first day of every month, and it was further stipulated therein that should defendant fail to pay said rent in advance when the same should become due, he thereby forfeited his rights under said lease, and agreed to surrender the premises to the lodge on demand.

The complaint further avers that defendant failed and refused to pay the instalments of rent which fell due on March 1 and April 1, 1909, and that on April 2, 1909, plaintiff demanded of defendant the possession of the premises described in the lease, and also, on the same day, caused a written notice to be served on defendant, which demanded that he turn over to plaintiff the immediate possession of said premises, on account of his failure to pay rent as stipulated in the lease. The complaint also avers that defendant refused to surrender possession, and that he unlawfully held over and detained said premises from the possession of plaintiff to its damage in the sum of \$50.

Appellant's first contention is that the complaint is insufficient for the reason that it fails to aver a demand for the

rent before declaring a forfeiture of the lease for nonpayment. Appellee contends that as the rent reserved by the lease is payable in advance, no notice or demand for rent was necessary.

A lease will be construed and understood in the light of the statutes of our State on the subject of landlord and tenant. These statutes will be regarded the same as

1. though they were written into and constituted a part of every such contract. A lease entered into for a specified term will continue until the expiration of the time named in the lease, unless it is sooner terminated in accordance with the provisions of our statutes, or unless it
2. is terminated or forfeited in accordance with some provision of the lease itself, or by the consent or agreement of the parties. If the rent stipulated by the terms of the lease is payable in advance, a failure on the part of the lessee to pay such rent in advance when due has the
3. effect by the terms of our statute to terminate said lease at the election of the lessor, and he may bring an action for possession without notice and without demand for either the rent or the possession. §8059 Burns 1908, §5213 R. S. 1881; *Ingalls v. Bissot* (1900), 25 Ind. App. 130, 57 N. E. 723; *McNutt v. Grange Hall Assn., etc.* (1891), 2 Ind. App. 341, 27 N. E. 325.

If the rent provided for in the lease is not payable in advance, a failure to pay rent when due does not *ipso facto* terminate the lease, and if the lease does not contain a

4. provision to the effect that it shall be forfeited on a failure to pay such rent, the lessor cannot declare a forfeiture on account of such failure to pay rent. In such case, however, the statute provides that he may terminate the lease by giving ten days' notice as provided by §8057 Burns 1908, §5211 R. S. 1881, and in case the rent is not paid within ten days after such notice is given, the lease is terminated at the expiration of such time. *Campbell v. Nixon* (1891), 2 Ind. App. 463, 28 N. E. 107; *Cheek v.*

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Preston (1905), 34 Ind. App. 343, 72 N. E. 1048; *Leary v. Meier* (1881), 78 Ind. 393.

If, however, the rent is not payable in advance, and the lease contains a provision to the effect that a failure to

5. pay rent when due shall forfeit the lease, the lessor need not resort to the statutory ten days' notice in order to terminate the lease, but may declare a forfeiture under the terms and provisions of the lease. A provi-
6. sion for the forfeiture of a lease on failure to pay rent is a sort of a condition subsequent, and is strictly construed. If the lessor seeks to enforce such a forfeit-
5. ure, he must first demand the rent on the leased premises just before sunset on the day the rent is due, providing there is no other place stipulated for such payment, and in case such rent is not paid he may then reënter as for a breach of a condition. *Faylor v. Bryce* (1893), 7 Ind. App. 551, 34 N. E. 833; *Jenkins v. Jenkins* (1878), 63 Ind. 415; *Philips v. Doe* (1851), 3 Ind. 132; *Bacon v. Western Furniture Co.* (1876), 53 Ind. 229.

If the complaint in this case did not allege that the rent was payable in advance, the position of appellant would be well taken, as, in such a case, it would be necessary to allege facts showing that the lease had been terminated either by notice as provided by §8057, *supra*, or by a forfeiture under the provisions of the lease. There is no pretense that the lease was terminated by the ten days' notice provided by statute, and the averments are insufficient to show a forfeiture under the terms of the lease, for the reason that no demand for rent is alleged on which a forfeiture could be based.

It appears, however, from the averments of the complaint, that the rent was payable in advance, and that the tenant had entered, and had refused and neglected to pay the

3. rent when due. Section 8059, *supra*, provides that under such circumstances no notice shall be necessary to terminate the tenancy. This court has held repeatedly, in construing this statute, that where the rent reserved in a

lease is payable in advance, and the rent is not paid when due, the lessor may elect to treat the tenancy as terminated, and may sue for possession, without either demanding the rent or giving notice. The complaint is clearly sufficient on the theory that the tenancy was terminated by a failure to pay rent in advance, as stipulated in the lease.

To this complaint appellant filed a general denial, and also a special paragraph of answer in confession and avoidance, in which he admitted that he was in possession

7. of the premises in controversy under a lease entered into with appellee, which provided that rent should be paid in advance on the first day of each and every month during its continuance, and which contained the provision of forfeiture as averred in the complaint. The answer also admits that the rent due on March 1 and on April 1, was unpaid on April 2, when the written demand for possession was served on appellant.

In avoidance of the facts averred in the complaint and admitted by this paragraph of answer, the following facts are therein averred. "And the defendant further charges and avers that under and by the terms and conditions of said lease the rent of said rooms and premises was \$16.66 $\frac{2}{3}$ per month, payable monthly in advance, but he says that notwithstanding such provisions and conditions in said lease, plaintiff never demanded payment of said monthly rents for said rooms and premises in advance and that this defendant never at any time paid said rentals monthly in advance; that during all the time he has so occupied said rooms and premises, said rents were paid not in advance, but after the time for which defendant paid had expired; that frequently during the said period the defendant so occupied said rooms and premises, the rent was not demanded by plaintiff or paid by defendant during a period of three months or more continuously; that from January 1st, 1907, no rent for said rooms and premises was demanded or paid until June 21st, 1907, when defendant paid said rent all at one time for said rooms

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from January 1st, 1907, until July 1st, 1907. And defendant further avers that on February 9th, 1909, he paid plaintiff \$38.33, the same being the rent in full for said rooms to March 1st, 1909. And defendant further says that by reason of plaintiff's omission, from the date of said tenancy, to wit: January 1st, 1901, to April 2d, 1909, to demand at any time said monthly rents for said rooms and premises in advance, and by reason of plaintiff receiving and accepting rents during all of said period after the rental period for which they were paid had expired, and by reason of the plaintiff permitting the rents to become and remain due and unpaid for several months at a time frequently during the long period of time plaintiff has used and occupied said rooms and premises under and by virtue of said lease, to wit: more than eight years, and had a right to believe and he verily did believe that plaintiff would not insist upon the forfeiture of said lease for the failure to pay said rent monthly in advance when one month of rent only was due and unpaid. And defendant further avers that he had paid said rent for said rooms and premises in full up to March 1st, 1909; that on the 2d of April, 1909, plaintiff served notice on this defendant that it had elected to forfeit said lease because there was then due and unpaid rent on said rooms and premises in the amount of \$16.67 and that said sum of \$16.67 was the rent then due plaintiff for the month of March, 1909, and that no other or additional rents were then due. And defendant avers that plaintiff made no demand upon defendant for said rent before declaring said lease forfeited. And defendant avers that the said plaintiff had elected to forfeit said lease for the nonpayment of said sum of money, the rental due, and for no other or different purpose whatever. And defendant further charges and avers that after the said notice was so served on him on, to wit: April 2d, 1909, and the same day on which said notice was served on him, he tendered plaintiff the sum of \$43.33 1/3 in money, that being the full amount due plaintiff as rent for

said rooms and premises and for steam heat for the same until May 1st, 1909; that plaintiff declined and refused to accept the same; and that afterwards, to wit: on the first day of each succeeding month up to and including the first day of September, 1909, defendant tendered to the plaintiff the entire sum and amount of rents and pay for steam heat due for said rooms and premises, including in each of said tenders the rent in advance for a month from the date of said tender; that on said 1st day of September, 1909, defendant tendered said plaintiff the full amount of rent then due the plaintiff for said rooms and premises until the 1st day of October, 1909, and also the full amount due plaintiff for steam heat for said rooms and premises, and that thereupon the officers and agents of plaintiff informed defendant that it was unnecessary to make further tender of rents for said rooms and premises, because the same would not be received or accepted. And defendant says that he is ready, willing, able and desirous of paying all of said rents so due the plaintiff for said rooms and premises and for the steam heat for the same, but that the plaintiff has refused since the 2d day of April, 1909, and still does refuse to receive or accept any of the said sum due as rents or for steam heat.”

The trial court sustained a demurrer to this paragraph of answer, and this ruling is assigned as error. The question is thus presented as to the sufficiency of the facts alleged in this paragraph of answer to constitute a waiver of the right of the lessor to terminate the lease on the failure of the lessee to pay the rent promptly, as provided therein, without first notifying the lessee that he intended in the future to insist on such right.

Under the terms of the lease, the lessor had the right at any time when the lessee failed to pay a month's rent in advance, when due, to terminate the tenancy without notice and without a demand for the payment of rent unless such right was waived, or unless its conduct, as shown by the answer under consideration, was such as to estop it from

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asserting such right. Waiver is defined as the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right; an election by one to forego some advantage he might have taken or insisted upon. 29 Am. and Eng. Ency. Law (2d. ed.) 1091; *Bucklen v. Johnson* (1898), 19 Ind. App. 406, 49 N. E. 612; *Warren v. Crane* (1883), 50 Mich. 300; *Frascr v. Aetna Life Ins. Co.* (1902), 114 Wis. 510, 90 N. W. 476.

There is a distinction between waiver and estoppel. A person who is in a position to assert a right or to insist on an advantage may, by his own words or conduct, and

9. without reference to any act or conduct of the other party affected thereby, waive such right; and once such right is waived it is gone forever, and he will therefore be precluded from asserting it. A person cannot, however, waive a right before he is in a position to assert it; but his words and conduct may be such before that time as to lead other persons relying thereon to act in such a way as to place them at a disadvantage, in which case he may be estopped from asserting the right. The first time ap-

7. pellant failed to pay the rent in advance, as provided in the lease under consideration, appellee was in a position to terminate the tenancy without notice. Being in such position, if he accepted payment of the instalment which was in default, he would be held to have waived his right to terminate the tenancy on account of such default. The right to terminate the tenancy for that default in the payment of rent could never thereafter be asserted, but it could not thereby be precluded, on the grounds of waiver, from asserting the right to terminate the tenancy on account of a subsequent failure to pay rent, if such failure should occur. On every subsequent failure on the part of the lessee to pay rent when due, the right to terminate the tenancy was available to the lessor, unless he was estopped from asserting such right.

It is admitted by the answer that the instalments of rent due on March 1, and on April 1, 1909, were not paid. Appellee was not in a position to insist on the termination of the tenancy on account of the failure to pay these instalments until after they were due, and it is not averred that appellee accepted either of these instalments of rent after it was due, or that it did any act after either was due to indicate an intention not to terminate the lease on account of the failure of appellant to pay these instalments of rent. We think that the answer does not state facts sufficient to show that appellee had waived the right to terminate the tenancy for failure to pay the rent in advance when due.

We have yet to consider whether appellee, under the averments of this answer, was estopped from asserting its right to terminate the tenancy for failure to pay the rent for March and April on the first day of each of said months, as provided in the lease. We have said that the failure of a lessor to collect the various instalments of rent when due, and his acceptance of such instalments after that time, constitutes a waiver of his right to terminate the tenancy only as to the defaults so waived, and would not, upon the principle of waiver, preclude him from afterwards asserting that right as to a subsequent default; but, while this is true, his conduct in this respect may be of such a character as to induce on the part of the lessee a well-grounded belief that the lessor does not desire or intend to terminate the tenancy at all on account of the failure to pay rent when due, as provided in the lease, and that he is satisfied to have the rent paid on request, or within a reasonable time after it is due.

If the conduct of a lessor is such as to be reasonably

10. calculated to induce such a belief on the part of the lessee, and if the lessee, by reason thereof, does so believe in good faith and, acting on such belief, is led to neglect the payment of the rent on the day on which it is due, when otherwise he would not have suffered a default to occur, then the lessor will be estopped from asserting the

right to terminate the leasehold on account of a default which was thus occasioned. An estoppel does not arise from the words or conduct of one party alone, as a waiver does. To create an estoppel, the words or conduct of the party estopped must be calculated to mislead the other party, and such other party must be misled thereby, and induced to act in such a way as to place him at a disadvantage.

The answer in this case avers facts showing a course of conduct by appellee well calculated to mislead appellant, and to induce in him a belief that appellee did not intend

11. at any time to insist on its right to terminate the leasehold on account of the failure on the part of appellant to pay rent promptly when due, and also avers that appellant did so believe in good faith. It fails, however, to aver that the failure of appellant to pay the instalments of rent due on March 1 and April 1 was due to a reliance in the belief thus induced, and for that reason the answer is insufficient on the ground of estoppel.

Another pleading, designated a cross-complaint, was filed by appellant, to which a demurrer was sustained. This

pleading contains all the material averments of the

12. answer which we have just considered, and in addition thereto contains the following allegation, "And the plaintiff herein says that he neglected to pay the rents in advance for the months of March and April, 1909, by reason of the conduct of the defendant hereto as hereinbefore set out in reference to the collection of said rents and to accept the same long after the same became and was due under the contract, he was led to and did believe that said lease would not be forfeited for said nonpayment of the rent as aforesaid and but for the conduct of the defendant hereto in reference to the said rents and their collection as hereinbefore set out he would have paid the said rents promptly in advance." This pleading is not open to the objection pointed out to the second paragraph of answer. The averments just set out are sufficient to show that appellant so

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acted on the belief induced by the conduct of appellee as to be prejudiced in his rights if appellee is permitted to terminate appellant's tenancy under the terms of the lease. This pleading states facts sufficient to constitute a cause of defense on the principles of estoppel. *Haldeman v. Sampter* (1884), 2 Del. Co. Rep. 106; *Oliver v. Brophy* (1886), 18 Weekly Notes of Cas. 427; *Thropp v. Field* (1875), 26 N. J. Eq. 82; *Consumers Gas Trust Co. v. Ink* (1904), 163 Ind. 174, 71 N. E. 477; *New American Oil, etc., Co. v. Troyer* (1906), 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *Rutherford v. Prudential Ins. Co.* (1905), 34 Ind. App. 531, 73 N. E. 202; *Sweetser v. Odd Fellows, etc., Assn.* (1889), 117 Ind. 97, 19 N. E. 722.

The character of a pleading will be determined from the facts averred therein, and not from the name given to it by the pleader. *Dreyer v. Hart* (1897), 147 Ind. 604, 47 N. E. 174; *State v. Finn* (1876), 45 Iowa 148; 1 Bates, Pl. and Pr. 159, and cases there cited.

The relief prayed for is not decisive of the relief to which a party is entitled under a pleading. This must be determined from its material averments, and the court will
14. grant a party the relief to which he is entitled under the facts averred. *Dehority v. Nelson* (1877), 56 Ind. 414; *Younkin v. Milwaukee, etc., Traction Co.* (1904), 120 Wis. 477; *Smith v. Smith* (1903), 67 Kan. 841; *State, ex rel., v. Horton Sand, etc., Co.* (1901), 161 Mo. 664.

The facts stated in the cross-complaint are sufficient to constitute a cause of defense, and the demurrer thereto should have been overruled.

Judgment reversed, with directions to grant a new trial, and leave is given to reform the issues.

NOTE.—Reported in 97 N. E. 546. See, also, under (1) 24 Cyc. 914; (2) 24 Cyc. 1336; (3) 24 Cyc. 1353; (4) 24 Cyc. 1349; (5) 24 Cyc. 1355; (6) 24 Cyc. 1347; (7) 24 Cyc. 1464, 1442; (8) 40 Cyc. 252; (9) 16 Cyc. 805; (10) 24 Cyc. 1359; (11) 24 Cyc. 1442; (12) 24 Cyc. 1404; 31 Cyc. 46; (13) 31 Cyc. 46; (14) 31 Cyc. 83. As to waiver of forfeiture of lease by acceptance of rent, see 47 Am.

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St. 198. On the question of the delay of a landlord in enforcing forfeiture as constituting waiver of breach, see 24 L. R. A. (N. S.) 1063. As to the effect of the customary acceptance of rent by a landlord after the stipulated time for payment, see 15 Ann. Cas. 253.

LORTZ ET AL. v. DAVIS, AUDITOR, ET AL.

[No. 7,690. Filed January 23, 1912. Rehearing denied April 3, 1912. Transfer denied May 8, 1912.]

1. **HIGHWAYS.—Opening.—Payment of Damages.—Authority of Board of Commissioners.—Void Action.—County Reform Law.**—Under the provisions of §§5936, 5937, 5938, 5939, 5942, 5943, 5944 Burns 1908, §§19, 20, 21, 22, 25, 26, 27 Acts 1899 p. 343, requiring the board of county commissioners to make estimates of their proposed expenditures by items separate from each other, providing for the making of appropriations by the county council, prohibiting the making of any expenditure out of the county treasury, except in certain cases, unless an appropriation therefor has been made and is not exhausted, prohibiting the making of any contract or the doing of any thing to bind the county contrary to the provisions of the act, and prescribing a penalty, the board of county commissioners has no authority, in the absence of an appropriation for that purpose, to order the payment out of the county treasury of damages awarded on account of the opening of a highway, and a final order for the opening of a highway, made at a time when there was no money in the county treasury available for the purpose of paying the damages allowed, is void. pp. 341, 346.
2. **HIGHWAYS.—Opening.—Payment of Damages.—Void Order.—Authority of Auditor and Treasurer.**—A final order of the board of county commissioners for the opening of a highway and the payment of damages awarded, made at a time when there was no money in the county treasury available for the purpose, will not authorize the auditor of the county to issue a warrant, nor the treasurer of the county to pay same if issued, and in the event of a payment under such circumstances the money may be recovered from those to whom it was paid, under the provisions of §5962 Burns 1908, Acts 1899 p. 343, §45. p. 345.
3. **HIGHWAYS.—Opening.—Payment of Damages.—“Judgment”.**—An allowance of damages by the board of county commissioners on ordering the opening of a highway, is not a judgment against the county rendered by a court having jurisdiction of the sub-

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ject-matter of the action and of the parties within the meaning of §5944 Burns 1908, §27 Acts 1899 p. 343, so as to become a binding obligation without a previous appropriation. p. 346.

4. APPEAL.—*Moot Questions*.—On appeal the court will not express an opinion on a question suggested by counsel, but not presented for decision in the case. p. 346.

From Bartholomew Circuit Court; *Marshall Hacker*, Judge.

Action by Adam Lortz and others against John M. Davis, as Auditor of Bartholomew County, and others. From a judgment for defendants, the plaintiffs appeal. *Reversed*.

Hord & Cox, Custer & O'Donnell, for appellants.

John W. Morgan, Donaker & Spaugh, for appellees.

LAIRY, J.—This action was brought by appellants against appellees to enjoin them from taking steps to carry out an order and judgment of the Board of Commissioners of the county of Bartholomew, purporting to establish a certain highway and to order it opened and kept in repair. The complaint proceeds on the theory that such order is void. The trial court sustained a demurrer to the complaint, and the plaintiffs stood on the demurrer, refusing to amend or plead further, whereupon final judgment was rendered against them, and the temporary restraining order granted in their favor was dissolved. On appeal the only errors assigned are the rulings of the court in sustaining the demurrers to the complaint and dissolving the restraining order. These questions may be considered together.

The allegations of the complaint, in so far as they are necessary to an understanding of the questions decided in this appeal, are, in substance, that appellants are the owners of land in Bartholomew county, Indiana, and that in the year 1909 James Golden and others filed in the office of the auditor of that county a petition for a certain highway, described in the complaint, which proposed highway, described in said petition, passed over and upon the lands of plaintiffs; that such proceedings were had as resulted in a favorable report

by viewers appointed to view said proposed highway, and that the plaintiffs thereupon filed separate remonstrances for damages, and the board appointed reviewers to assess such damages, and that the reviewers so appointed did, on July 31, 1909, make a report assessing damages to the several plaintiffs in the amounts following, to wit: to Adam Lortz, \$185; to Martin A. Holder, \$185; to Martha Ruddick, \$15, and to Sarah Reed, \$115. Plaintiffs further aver that at the August term of the commissioners court, the reviewers' report was adopted by the board, which indorsed thereon the following words, "Accepted, Board of Commissioners of Bartholomew county, W. O. Black, President. No. Funds wherewith to pay damages. Hold." The complaint then proceeds in the language following: "Plaintiffs aver that at said time said Board of Commissioners through its clerk, John M. Davis, as Auditor of said Bartholomew County, caused to be made an order purporting to be a final order opening said highway, and ordering that the same be opened and kept in repair, which said order and judgment of said defendant, Board of Commissioners of Bartholomew County, is as follows, to wit: 'In the matter of the Petition of James Golden, etc. * * * The Board now having examined said report, and being sufficiently advised in the premises, finds that said report ought to be approved. It is therefore considered, ordered and adjudged by the Board that the proposed new highway as marked and laid out by the viewers in their report as herein above set forth and as described in said report be recorded as a public highway of the width of 30 feet, and the Trustee of Flatrock Township is hereby ordered to cause said highway to be opened and kept in repair as other highways. It is further ordered that the Auditor transmit a copy of this order to the Trustee of Flatrock Township. The Auditor is further ordered to issue a warrant in favor of Fannie Kent in the sum of \$70.00, to Martha Ruddick in the sum of \$15.00, to Sarah F. Reed the sum of \$115.00, to Adam Lortz in the sum of \$185.00 and to

Martin Holder in the sum of \$185.00, being the amount allowed to the remonstrators by the reviewers on account of the location of said highway.' Plaintiffs aver that upon said pretended final order and judgment, attempting to open said highway, there was endorsed the following: 'Do not send order to open, until there are funds to pay.' That at said time of making said attempted final order and judgment there were no funds in the County Treasury with which to pay said damages, and that at the time said order and judgment were made there were no funds available for that purpose, and that none of said damages were paid or tendered to either of these plaintiffs by said defendant Board nor by said petitioners. Plaintiffs aver that on the 7th day of September, 1909, more than thirty days after the entry of said pretended and void order attempting to establish and open said highway, said defendant, Board of Commissioners, and said defendant, John M. Davis, procured an order from the County Council of Bartholomew County, Indiana, appropriating the sum of \$600.00 for the use of the highways and for the payment of damages of opening highways in said county for the year, ending December 31, 1909. That said described 'Golden Highway' is the only highway for which said money can be used, and that said sum will be used to pay said damages; that said sum is now available for such purpose and said defendant, Davis will immediately issue warrants for damages to these plaintiffs, and will issue his warrant to said defendant, Aaron Newton, trustee as aforesaid. That at the time of making such pretended final order and judgment there were no funds with which to pay such damages, and no funds were available for the payment of said damages and for more than thirty days before any amounts were or could have been tendered or paid into the county treasury for these plaintiffs or for their benefit. That said pretended order and judgment is void; that said defendant, John M. Davis, Auditor as aforesaid, will proceed to issue an order and warrant to defendant, Aaron

Newton, Trustee as aforesaid, for the opening of said highway; that said Davis will, if not enjoined immediately, issue warrants for the payment of said damages; that said trustee will, if not enjoined, deliver said order to open said highway to defendant, George Chandler, Road Supervisor as aforesaid for the district wherein said highway is located; that unless defendants are immediately restrained they will carry out said void order and judgment to plaintiffs' great and irreparable damage, and plaintiffs will be without any remedy."

Appellants contend that the order establishing the highway and directing that it be opened and kept in repair is void, for the reason that at the time the order was

1. made and the damages ordered paid out of the county treasury there was no money in the treasury available for such purpose.

In the case of *Helms v. Bell* (1900), 155 Ind. 502, 58 N. E. 707, the board of commissioners decided that the proposed highway was not of sufficient public utility to warrant the payment of the damages allowed to the remonstrators out of the county treasury. The board made an order establishing the highway, and directing that it be opened and kept in repair, and further ordered that the petitioners pay the damages as a condition precedent to the road being opened. The petitioners within thirty days after this order was entered, paid into the auditor's office an amount of money sufficient to pay the damages awarded to the remonstrants, and the auditor offered to each of them the amount of damages awarded, but they refused to accept the damages so tendered, and brought a suit to enjoin the opening of the road, on the ground that the order establishing it and directing that it be opened was void. In passing on this question the court said: "When they had adjudged that the damages could not be paid out of the county treasury their power to proceed with the establishing of the road was suspended until actual payment of such damages had been made from

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some other source. When not payable out of the treasury it is proper for the petitioners or other persons to pay them. *Hayes v. Board, etc.* (1877), 59 Ind. 552; *Board, etc., v. Small* (1878), 61 Ind. 318. And the effect of payment from any source upon the power of the commissioners to proceed in establishing the highway is stated in said §6748 [Burns 1894] thus: 'And *when* payment of damages is made as herein provided, such highway shall be *recorded and ordered to be opened* and kept in repair as hereinbefore provided.' That is to say, when the damages have been paid from some source to the use of the persons entitled thereto, and *not till then*, the commissioners have a right to proceed to record, that is, to enter final judgment, establishing the highway, and to order that the same be opened and kept in repair. Because the record shows that the commissioners in this instance entered final judgment ordering the recording and opening of the highway, before the damages assessed were paid, in violation of the positive inhibition of the statute, their judgment was clearly void."

In the case of *Rudisill v. State, ex rel.* (1872), 40 Ind. 485, the board of commissioners ordered that the damages be paid out of the county treasury, and it was held that the money to pay the damages was, in presumption of law, already in the county treasury, and the auditor of the county was authorized by order of the board of commissioners to draw warrants in favor of the persons to whom damages had been awarded in the amount allowed to each. The opinion proceeds as follows: "We are of the opinion that, when the amount of damages is ordered to be paid out of the county treasury, as in this case, the commissioners may treat the case as one where the amount is deposited in the treasury for the use of the parties entitled to the same, and proceed to order the road to be opened and kept in repair."

These cases are not in conflict with each other, and neither is decisive of the precise question involved in this case, but they have the effect of narrowing the controversy in this

case. The case first cited decides that the order of a board of commissioners establishing a highway is absolutely void, when made before the money to pay the damages assessed has been paid into the county treasury by the petitioners and has become available for such purpose, and that such order is not validated by the fact that the money to pay such damages is afterwards paid in and becomes available.

The second case cited holds that in a case where the damages were ordered paid out of the county treasury under the law as it existed at the time that decision was made, the presumption obtained that the money out of which the damages were to be paid was already in the county treasury for the benefit of the persons to whom the damages had been awarded, and subject to their claim to receive it on demand.

It appears from the averments of the complaint in the case at bar that, at the time the order establishing the highway in question was made, no appropriation had been made by the county council of Bartholomew county for any money for the purpose of paying claims of this character, and that no such appropriation was made until about thirty days after the order in question was entered. It is claimed on behalf of appellants that since the enactment of the county reform statute the court can no longer indulge the presumption that money out of which the damages allowed was in the county treasury at the time the order was made, and subject to be paid on demand to those in whose favor the damages were allowed. It is insisted that the complaint affirmatively shows that no money, which was available for the payment of such damages, was in the county treasury at the time the order for the establishment of the highway in question was made, and that such order was void under the authority of the case first cited.

We will now consider the effect of the statute known as the county reform act (Acts 1899 p. 343, §§5918-5968 Burns 1908). Section 19 of the act (§5936 Burns 1908) provides that every estimate required to be made by the board of

county commissioners shall embrace in items separate from each other the following matters. Then follow fifteen specific subjects on which estimates are required. The sixteenth requirement is as follows: "All other items of expenditures to be made by the board, or pursuant to its order during the year for which the appropriation is to be made, itemized with particularity."

Section 20 of the act (§5937 Burns 1908) provides for appropriations by the county council, and §21 (§5938 Burns 1908) provides for additional appropriations in certain cases. Section 22 (§5939 Burns 1908) provides that in certain specified cases therein enumerated moneys may be paid out of the county treasury without an appropriation being previously made, and then concludes: "In all other instances no warrant shall be drawn upon, or money paid out of the county treasury, unless an appropriation by the county council has been made, * * * and which appropriation remains unexhausted."

Section 25 of the act (§5942 Burns 1908) is as follows: "No board of county commissioners, officer, agent or employe of any county shall have power to bind the county by any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the obligation attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriation, are declared to be absolutely void."

Section 26 of the act (§5943 Burns 1908) provides: "Every county officer, and every member of a board of commissioners, who shall issue, or cause to be issued, any bond, certificate, or warrant for the payment of money which shall purport to be an obligation of such county, and be beyond the unexpended balance of any such appropriation made for such purpose, or who shall attempt to bind such county by

any contract, agreement, or in any other way, to an extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond to any person injured thereby, and shall be fined in any sum not more than one thousand dollars, and imprisoned in the county jail not more than six months.”

Section 27 of the act (§5944 Burns 1908) is as follows: “No court, or division thereof, of any county, shall have power to bind such county by any contract, agreement, or in any other way, except by judgment rendered in a cause where such court has jurisdiction of the parties and subject-matter of the action, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such court, and for the purpose for which said obligation is attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort attempted beyond such existing appropriations shall be absolutely void.”

We think it is very evident, from the provisions of the statute above quoted and referred to, that, in the absence of an appropriation for that purpose, the board of commissioners had no authority to make an order for the payment out of the county treasury, of the damages awarded on account of the opening of the highway in question. Such order did not authorize the auditor to issue his warrant or the treasurer of the county to pay such warrant in the absence of an appropriation for that purpose, and in case money had been paid out of the county treasury on any such warrant it could have been recovered from the person to whom it was paid. §5962 Burns 1908, Acts 1899 p. 343, §45.

On behalf of appellees it is urged that the several allowances made to appellants as damages were judgments against the county rendered by a court having jurisdiction of the sub-

ject-matter of the action and of the parties, within the
3. meaning of §27, *supra*, and for that reason no previous appropriation was required. We cannot agree with this contention. The county was not a party to this proceeding. No relief was asked against the county, and there was no preëxisting claim against it on which a judgment could rest. There was no duty resting on the county to pay these claims for damages, that matter being left entirely to the discretion of the board of commissioners. The obligation of the county to pay these claims had no existence prior to the time this order was made directing that they be paid out of the county treasury, and such obligation was created, if at all, by such order. In our opinion such order was not a judgment against the county but was an allowance which the board had no power to make in the absence of an appropriation for that purpose.

If in a highway case a board of commissioners should determine that the highway was of sufficient public utility to justify the payment of the damages awarded out of the county treasury, the question might arise as to whether the county council could be compelled by mandate to make the necessary appropriation in case this had not already been done.

4. While this question is suggested by counsel, it is not presented for decision in this case, and we cannot properly express any opinion on the subject.

As there was no money in the county treasury which was available for the payment of damages allowed for opening highways at the time the order was made directing

1. such payment, and as the money did not become available until about thirty days after the final order establishing the highway was made, we hold, under the authority of *Helms v. Bell*, *supra*, that such final order was void, and that the complaint states a cause of action. The demurrer to the complaint should have been overruled.

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Judgment reversed, with directions to overrule the demurrer to the complaint.

NOTE.—Reported in 97 N. E. 200. See, also, under (1) 11 Cyc. 511; (2) 11 Cyc. 535; (4) 3 Cyc. 223. As to the application of *ultra vires* to county officers, see 68 Am. Dec. 292.

RUMP v. WOODS.

[No. 7,588. Filed May 8, 1912.]

1. NEGLIGENCE.—*Automobile Accident.—Contributory Negligence.—Trial.—Answers to Interrogatories.*—In an action for injuries incurred in an automobile accident, where answers by the jury to interrogatories showed that plaintiff looked south just before he stepped from his wagon, and did not see defendant's automobile approaching from that direction, that he picked up two bottles of milk and stepped out upon the street while the wagon was still moving, that he did not look to the south a second time before starting across the street and that if he had done so he could have seen the automobile within twenty-five feet of him and could have avoided the injury, but did not show how long it was after he had looked south until he was struck, nor how far he had walked, such answers were not sufficient to overcome the general verdict on the theory that they showed contributory negligence as a matter of law, since evidence was admissible under the issues from which the jury may properly have found that plaintiff was in the exercise of ordinary care. p. 350.
2. NEGLIGENCE.—*Automobile Accident.—Contributory Negligence.—Question for Jury.*—In an action for injuries to plaintiff by being struck by an automobile while he was attempting to walk across a street, where there was evidence that he used some care, it was for the jury to determine from the facts shown whether he exercised the care that a person of ordinary prudence would have exercised under the circumstances. p. 351.
3. NEGLIGENCE.—*Use of Streets.—Presumption.*—Pedestrians in a street have a right to presume, in the absence of knowledge to the contrary, that all persons using the street are exercising ordinary care to avoid injuring them. p. 352.
4. NEGLIGENCE.—*Automobile Accident.—Contributory Negligence.—Presumption as to Use of Street.—Consideration by Jury.*—While the wrongful conduct of the defendant in operating his automobile at an excessive rate of speed, by reason of which plaintiff was injured while crossing a street, would not excuse plaintiff

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from the exercise of ordinary care, the jury had a right, in determining whether from the facts shown the plaintiff was guilty of contributory negligence, to consider the presumption that defendant would use ordinary care to avoid injuring pedestrians. p. 352.

5. NEGLIGENCE.—*Automobile Accident.—Use of Streets.—Instruction.—Harmless Error.*—Where plaintiff was injured by an automobile while he was attempting to cross a street, an instruction which told the jury that a pedestrian in a street is not guilty of contributory negligence if he fails to anticipate or take special precautions against injury by persons riding or driving at an unlawful or dangerous rate of speed, although inaccurate in not stating that a duty to use special precautions arises where the pedestrian has knowledge of the negligent or unlawful use of the street by one riding or driving thereon, was harmless in the absence of evidence showing that plaintiff prior to his injury, had any knowledge of any special or particular danger from the excessive speed of defendant's automobile. p. 353.
6. NEGLIGENCE.—*Automobile Accident.—Use of Streets.—Care Required of Pedestrians.*—Where a pedestrian in a street uses such care as would be ordinarily requisite to protect himself from injury by an automobile carefully operated thereon, he has discharged his full duty and is not guilty of contributory negligence, but if he has knowledge that the same is being operated in a negligent, reckless or unlawful manner, he is charged with a special duty of using such additional care as reasonable prudence dictates in view of the increased danger. p. 353.
7. NEGLIGENCE.—*Automobile Accident.—Instructions.—Care Required in Use of Streets.*—In an action for injuries caused by an automobile while plaintiff was crossing a street, an instruction which told the jury that it is the duty of an operator of an automobile on a highway or street to avoid causing injury, erroneously stated a degree of care not imposed by the law, and the error was not cured by the latter part of the instruction stating that the duty imposed required the operator to take into consideration the character of his machine, the manner of its running, its power, whether it is operated in a populous part of the city and on a much traveled street, and from these and all other pertinent considerations to proceed with that speed and caution which reasonable care requires according to the place and the presence of other travelers and vehicles. p. 354.
8. APPEAL.—*Review.—Instructions.—Contradiction.*—The giving of an instruction announcing two standards of duty for the measurement of defendant's conduct in determining whether he was negligent, is prejudicial error. p. 355.
9. TRIAL.—*Instructions.—Province of Jury.—Contributory Negli-*

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gence.—An instruction that a person on foot, while lawfully using a public street, is not required to be looking or listening continuously to ascertain whether automobiles are approaching, under the penalty, on failure to do so, of being presumed negligent if he is injured, is erroneous, since the question of whether a failure to look or listen continuously will constitute negligence must depend upon the circumstances of the occasion and is for the jury to determine. p. 355.

10. TRIAL.—*Instructions.*—*Invading Province of Jury.*—A court may not substitute its judgment on a question of fact for the judgment of the jury. p. 356.

11. WITNESSES.—*Physician.*—*Failure to Call.*—*Effect.*—The fact that the plaintiff in an action for personal injuries did not call a physician who attended him to testify as to his injuries, should not be considered as detrimental to plaintiff's case. p. 356.

12. EVIDENCE.—*Opinion.*—*Speed.*—*Non-Expert Witness.*—*Competency.*—One who has had some opportunity, even though limited, to observe the speed of an automobile immediately prior to its collision with plaintiff, is competent to express an opinion as to its speed without qualifying as an expert. p. 356.

13. EVIDENCE.—*Opinion.*—*Speed.*—*Non-Expert Witness.*—*Opportunity for Observing Speed.*—*Weight of Testimony.*—The opportunity had by a non-expert witness to observe the speed of an automobile, as to which he has expressed an opinion, may be considered as affecting the weight of his testimony. p. 357.

14. DEPOSITIONS.—*Examination Before Trial.*—*Corrections.*—Where a deposition or examination is presented to a witness or party for his signature, he may have any corrections made therein necessary to make it speak the truth, but such corrections should be made before the notary taking the deposition or examination, either on notice to the opposite party or his attorney, or on voluntary appearance. pp. 357, 358.

From Allen Circuit Court; *Edward O'Rourke*, Judge.

Action by Alvey Woods against Frederick J. Rump. From a judgment for plaintiff, the defendant appeals. *Reversed.*

William P. Breen and *John Morris*, for appellant.

James B. Harper and *John W. Eggeman*, for appellee.

LAIRY, J.—This is an appeal from a judgment in favor of appellee, for damages for personal injuries caused by a collision with the automobile of appellant. With its general verdict the jury returned answers to a number of interrogatories. Appellant moved in the trial court for judgment on

the answers to interrogatories notwithstanding the general verdict, which motion was overruled. This ruling is saved and assigned as error.

The facts as found by the jury in answers to interrogatories are, substantially, as follows: Fairfield avenue, in the

city of Fort Wayne, is a public highway running

1. north and south, and at the point where appellee was injured it runs through a business, or closely built up portion of the city, and there are sidewalks on each side thereof. Appellee was driving a milk wagon, with two horses attached to it, on the west side of the highway used for conveyances. He was driving the wagon himself, and Mr. Bradbury sat on the left-hand side of him. When he had driven his wagon a short distance south of Taylor street, he alighted from it on the east side, with his face towards the east, carrying a milk bottle in each hand, and started directly across the street to deliver the milk to Doctor Berry on the opposite side of the street. Just before appellee alighted from the milk wagon he looked south on Fairfield avenue, but did not see appellant's automobile approaching him, because it was not in sight. When he alighted, he did not look south on Fairfield avenue for approaching vehicles, and had he done so he could have seen appellant's automobile approaching him, and the collision would not have occurred in the manner in which it did. At that time the automobile was within twenty-five feet of appellee, and was going at the rate of thirty miles an hour. After appellee started to cross the street he collided with appellant's automobile, and was injured.

Appellant insists, with much earnestness, that the facts stated in the answers to interrogatories show that appellee was guilty of contributory negligence as a matter of law. According to these answers, appellee looked south on Fairfield avenue just before he stepped out of the wagon, and did not see the automobile approaching from that direction. He picked up two bottles of milk, and stepped out on the

street, while the wagon was still moving, but he did not look to the south a second time before starting to cross the street; if he had done so, he would have seen the automobile within twenty-five feet of him, and could have avoided the injury. The interrogatories do not show how much time elapsed from the time he looked south until he was struck. Evidence may have been introduced to show that only a short time had elapsed, and that his attention was attracted in the opposite direction by approaching vehicles. The interrogatories do not show how far he had walked before he was struck, and the evidence may have shown that he was struck when taking the second or third step. He was required to look north as well as south, and the evidence may have shown that on stepping out of the wagon he looked first in that direction, or that his attention was diverted by other vehicles on the street. It is apparent, we think, that evidence was admissible under the issues from which the jury may properly have found that appellee was in the exercise of ordinary care, even though he did not look south after getting out of the wagon and before starting to cross the street. The motion for judgment on the interrogatories was properly overruled.

It is claimed by appellant that the evidence shows without dispute that appellee was guilty of contributory negligence, and that, therefore, his motion for a new trial should have been sustained, on the ground that the verdict is not sustained by the evidence.

We have examined the evidence in this case bearing on the question of contributory negligence, and we are of the opinion that this question was properly submitted to the

2. jury for its decision. It is apparent from the evidence that appellee used some care in looking for the approach from the south, of automobiles and other vehicles. It was for the jury, under the facts shown in the case, to say whether the care used was such as a person of ordinary prudence would have exercised under the circumstances. Where

the facts and circumstances as disclosed by the evidence are of such a nature as to warrant different inferences, so that two minds of equal fairness and intelligence might reach opposite conclusions, the question of contributory negligence should be submitted to the jury. *Cleveland, etc., R. Co. v. Lynn* (1909), 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017; *Baltimore, etc., R. Co. v. Walborn* (1891), 127 Ind. 142, 26 N. E. 207; *Mann v. Belt R., etc., Co.* (1891), 128 Ind. 138, 26 N. E. 819.

In the absence of knowledge to the contrary, appellee had a right to presume that all persons using the street, including appellant, would use ordinary care to avoid injur-

3. ing pedestrians in the street. He had a right to presume that automobiles would not be run at an unlawful or dangerous rate of speed, but that they would be operated at such a rate of speed and with such care as reasonable prudence required, in view of all the conditions and

4. circumstances. While the wrongful conduct of appellant in operating his automobile at an excessive rate of speed would not excuse appellee from the exercise of ordinary care; still, the jury had a right to consider this presumption in determining whether his conduct at and immediately before his injury was reasonably prudent under the circumstances. The evidence shows that when appellee looked south, before alighting from the wagon, he had an unobstructed view of the street for 450 feet, and that he saw no automobile approaching from that direction. In deciding whether appellee used ordinary care in attempting to cross the street without again looking south after he alighted from the wagon, the jury had a right to consider whether a man of ordinary prudence would have believed, under the circumstances, that he could cross before an automobile driven at a reasonable rate of speed would cover that distance. *Cleveland, etc., R. Co. v. Lynn, supra.*

We are next required to consider whether the court committed reversible error in its instructions to the jury, and in

refusing to give certain instructions requested by appellant. The first instruction is objected to on the ground that it misstates the issues. The issues are not stated in this instruction with accuracy, and it is subject to criticism on that account, but we need not decide whether this constitutes reversible error, for the reason that the case must be reversed for error in giving other instructions. As the same mistake is not likely to occur on a retrial of the case, we need not further consider this instruction.

By instruction five, the court told the jury that a person traveling on foot in a street is not guilty of contributory negligence if he fails to anticipate or take special
5. precautions against injury by persons riding or driving at an unlawful or dangerous rate of speed.

A person traveling on foot in or across a street is required to use ordinary care to avoid being injured by coming in contact with cars or vehicles operated or driven in the
6. street. He has a right to presume that persons in charge of cars and other vehicles will use ordinary care to avoid injuring him, and to govern his conduct accordingly. If he uses such care as would be ordinarily requisite to protect himself from injury by cars carefully operated, he has discharged his full duty, and is not guilty of contributory negligence. However, if he knows that a car or other vehicle is being operated on said street in a negligent, reckless or unlawful manner, then a special duty arises to use such additional care as reasonable prudence would dictate in view of the increased danger so occasioned. The care used should be proportionate to the danger ordinarily incident to crossing the street, unless special or particular dangers are known, in which event, the care must be proportioned to such known dangers. This instruction is not a strict-
5. ly accurate statement of the law. While it is true that appellee was not bound to anticipate that appellant or any one else would be riding or driving in the street

at an unlawful or dangerous rate of speed, and would not be under obligations to take precautions against injury from such an act, unless he knew of it in time to do so, still, if he had known that such automobile was approaching at a dangerous rate of speed, it would have become his duty to use special precautions in view of the danger thus occasioned. In this case, however, there is no evidence to show that appellee, prior to his injury, had any knowledge of any special or particular danger occasioned by the excessive speed of this car, and the error in this instruction was therefore harmless.

Instruction nine is as follows: "It is the duty of the operator of an automobile upon a highway or street to avoid causing injury, and this duty requires him to take into
7. consideration the character of his machine, whether in its operation it is practically noiseless, its power, the manner in which it runs, whether it is operated in a populous part of the city and upon a much traveled street, and from these and all other pertinent considerations to proceed with that speed and caution which reasonable care requires according to the place and the presence of other travelers and vehicles." By the first part of this instruction the jury was told that it is the duty of the operator of an automobile on a highway or street to avoid causing injury. This part of the instruction imposes on the operator of an automobile the obligation of an insurer. If he so operates his automobile that no injury is caused thereby, he has discharged his duty, but if any one is injured as a result of such operation, he has violated his duty and is liable. The law does not impose so high a duty. It is the duty of a person driving an automobile to use ordinary care to avoid causing injury, in view of the conditions and circumstances. The latter part of the instruction does not cure the error contained in the first part. It is probable that the latter part of the instruction is susceptible of the meaning that only ordinary care is required of the driver of an automobile, but when it is con-

sidered in relation to the former part, it is doubtful whether the jury so understood it. In any event, the two parts of the instruction are contradictory, the first part imposing a duty of a much higher class than the last part. The instruction, at the best, announces two standards of duty by which the jury was authorized to measure the conduct of appellant for the purpose of deciding whether he was negligent, and we cannot say which one of these standards was applied. The error was necessarily prejudicial. A contradictory or confusing instruction cannot be regarded as harmless. *Summerlot v. Hamilton* (1889), 121 Ind. 87, 22 N. E. 973; *Fowler v. Wallace* (1892), 131 Ind. 347, 31 N. E. 53.

By the tenth instruction the court told the jury that a person on foot, while lawfully using a public street, is not required to be looking or listening continuously to ascertain whether automobiles are approaching, under the penalty, on failure to do so, of being presumed negligent, if he is injured. This is not a correct statement of the law. It must be left generally to the jury to say what acts constitute ordinary care, and what acts do not constitute such care. The effect of this instruction is to advise the jury, as a matter of law, that ordinary care does not require a person while crossing a public street to be looking continuously to ascertain whether automobiles or other vehicles are approaching. This must depend on circumstances. It is possible that a public street might be so congested with traffic of various kinds as to render it very hazardous for a person to endeavor to cross it on foot, without looking and listening constantly, while, on the other hand, it might be so little frequented by conveyances dangerous to pedestrians as to render slight care in this particular altogether sufficient. It was for the jury in this case to say just how much care, in respect to looking and listening, should have been used by appellee in crossing this particular street, in view of the conditions disclosed by the evidence.

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It would have been error for the court to say, as a matter of law, that ordinary care required appellee to look and listen constantly, and it was also error to instruct the jury that ordinary prudence did not require him to do so. The

10. court may not substitute its judgment on a question of fact for the judgment of the jury.

The same objections pointed out to instruction ten apply with equal force to instructions eleven and seventeen.

The court did not err in giving to the jury instruction sixteen and one-half. By that instruction the jury was told that the fact that plaintiff did not call the physician

11. who attended him at the hospital, to testify as to his injuries, should not be considered by it as detrimental to plaintiff's case. The case of *City of Warsaw v. Fisher* (1900), 24 Ind. App. 46, 55 N. E. 42, decided by the Appellate Court, has been disapproved by the Supreme Court in the case of *William Laurie Co. v. McCullough* (1910), 174 Ind. 477, 90 N. E. 1014, 92 N. E. 337, in view of which fact the case first cited can no longer be regarded as authority on the question here involved.

Appellant's reasons for a new trial numbered thirty-three, thirty-four, thirty-seven, forty, forty-one, forty-two and forty-three call in question the action of the trial court in admitting the testimony of certain witnesses as to the speed of appellant's automobile just before and at the time it struck appellee. It is not necessary, in order to ren-

12. der a witness competent to express an opinion as to the speed of a train, that he should qualify himself as an expert. *Louisville, etc., R. Co. v. Jones* (1886), 108 Ind. 551, 567, 9 N. E. 476; *Louisville, etc., R. Co. v. Hendricks* (1891), 128 Ind. 462, 28 N. E. 58.

It is asserted by appellant that the witnesses who testified as to the speed of the automobile were not competent to express an opinion on this subject, for the reason that they had no sufficient opportunity to observe its speed at the time of and just prior to the accident. It is undoubtedly true that

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a witness who did not see the automobile in motion just prior to the injury to appellee, or who did not possess some other means of judging of its speed at that time, would not be competent to express an opinion as to such speed. But a witness who had some opportunity, even though limited, of observing its speed, may express an opinion on that subject.

The fact that his opportunity of observing the speed of the machine was slight, may be considered as affecting the weight of the testimony, but does not affect its competency. All the witnesses who were permitted to testify, disclosed by their evidence that they had some opportunity of observing the speed of the automobile. The court did not err in admitting this testimony. Its weight was for the jury.

On the trial, appellant introduced the examination of appellee taken before the trial and filed with the clerk of the court under the provisions of §533 Burns 1908, §509

14. R. S. 1881. Appellant read all of said questions to and including question 260 and the answers thereto. Appellee's attorneys thereupon offered to read a number of statements made by appellee, following the answer to question 260 and preceding appellee's signature, which statements purport to correct and explain certain answers made by appellee to certain questions in the course of the examination referred to in such statements. The court permitted these statements to be read to the jury over the objection of appellant, and this is assigned as one of the reasons for a new trial.

It appears from the record that the examination of appellee was taken at the law office of appellant's attorneys by agreement, before Benita Fox, a notary public. The statements purporting to be corrections and explanations of answers were made a week or two after appellee gave his testimony, at a time when he was at the office of his own attorney for the purpose of signing his examination. The statements were reduced to writing by a stenographer, in the

absence of appellant and his attorneys and of the notary who took the examination, after which appellee attached his signature.

In case a deposition or examination is taken in shorthand, and afterwards copied in longhand, and presented to a witness or party for his signature, there can be no doubt as to the right of such witness or party to have any such corrections made therein as may be necessary to make it speak the truth. If an answer has been incorrectly taken down, he may have this corrected, or if by mistake or through a mis-

understanding of the question he has made a wrong

14. answer, he has a right to explain this fact. Such corrections or explanations should be made, however, before the notary who is engaged in taking the examination, either on notice to the opposite party or his attorneys, or on voluntary appearance. On such corrections and explanations being made, either party would then have the right to ask further questions, and the rights of both parties would thus be protected; but if a party whose examination has been taken has a right to make such changes in his answers as he may desire, without giving the opposite party any opportunity further to question him on the subject, the purpose of the examination may be defeated. We need not decide in this case whether the admission in evidence of the statements attached to the examination constitutes reversible error. It is sufficient to say that the practice of making corrections or changes in the answers contained in examinations or depositions, at a time when the other party to the litigation is not represented, is a practice not to be commended, and may constitute reversible error.

Other questions presented need not be discussed, as they will probably not arise on a retrial of this case.

For error of the court in giving instructions nine, ten, eleven and seventeen, the judgment is reversed, with directions to grant a new trial.

Judgment reversed.

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NOTE.—Reported in 98 N. E. 369. See, also, under (1) 29 Cyc. 655; (2) 29 Cyc. 640; (3) 29 Cyc. 516; (5) 29 Cyc. 659; (6) 29 Cyc. 515; (7) 29 Cyc. 650; (8) 38 Cyc. 1604; (9) 38 Cyc. 1646; (11) 16 Cyc. 1062; (12, 13) 17 Cyc. 105, 107; (14) 13 Cyc. 969, 970. As to the contributory negligence of one injured through the other's negligence of two persons using a highway, see 48 Am. St. 373. As to the rights and duties of persons driving automobiles in highways, see 13 Ann. Cas. 463; 21 Ann. Cas. 648. The authorities on the duty of a pedestrian to look out for auto cars are collated in notes in 3 L. A. R. (N. S.) 345 and 20 L. A. R. (N. S.) 232. As to duty of operator of automobile to stop in order to avoid collision with pedestrian, see 24 L. R. A. (N. S.) 557. On the duty and liability of person operating automobile on public streets or highways generally, see 4 L. R. A. (N. S.) 1130. For reciprocal duty of operator of automobile and pedestrian to use care, see 38 L. R. A. (N. S.) 487 and 42 L. R. A. (N. S.) 1178. On the question of evidence as to speed of automobiles or other road vehicles, see 34 L. R. A. (N. S.) 778. For speed of automobiles as negligence, see 25 L. R. A. (N. S.) 40.

RAGLE ET AL. v. DEDMAN ET AL.

[No. 7,619. Filed May 9, 1912.]

1. TENANCY IN COMMON.—*Nature of Possession.*—There was unity of possession between tenants in common who acquired their land by descent, although the quantitles of their estate or interest may have been unequal. p. 361.
2. DEEDS.—*Covenant of Warranty.—Construction.—Statute.*—Where a deed recites that the grantor "conveys and warrants" the premises, the provisions of §3958 Burns 1908, §2927 R. S. 1881, that such a deed shall be deemed a conveyance in fee simple, with covenant that the grantor is lawfully seized of the premises, that he guarantees quiet possession thereof, that the same are free from all incumbrances and that he will warrant and defend the title to the same against all lawful claims, should, in the construction of such deed, be read into it as if written therein at full length. p. 361.
3. TENANCY IN COMMON.—*Rights of Tenants.*—Tenants in common have all the rights of a tenant in severalty, except that of sole possession. p. 362.
4. TENANCY IN COMMON.—*Conveyance by One Tenant in Common.—Covenants.*—Where a tenant in common conveys his interest, any covenant in the deed is limited to the interest granted. p. 362.

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5. DEEDS.—*Construction*.—Where the wording of a deed is subject to more than one construction, it must be construed so as to effectuate the intention of the contracting parties. p. 362.
6. DEEDS.—*Operation*.—*Judicial Power*.—Where the language employed in a deed is not uncertain, the contract as expressed in the deed must be enforced as made, although, in the opinion of the court, it may seem in some respects inequitable. p. 363.
7. DEEDS.—*Conveyance by Joint Tenants*.—*Covenants*.—*Joint or Several Nature*.—Where land was conveyed by warranty deed by tenants in common who had acquired the same by descent, and at the time there was a valid judgment against one of the tenants which was a lien on his interest, the covenants in the deed, in the absence of language limiting them to the separate interests, must be construed as joint and as rendering all the tenants liable for the breach of the covenant arising from the existence of such judgment lien. p. 363.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by John W. Ragle and others against Eliza J. Dedman and others. From a judgment for defendants, the plaintiffs appeal. *Reversed*.

Stanley M. Krieg, Cicero Fettinger and W. D. Curll, for appellants.

Tweedy & Youngblood, for appellees.

MYERS, J.—This action was commenced in the Pike Circuit Court, and on change of venue was sent to the Dubois Circuit Court. A demurrer for want of facts was sustained to appellees' second and third paragraphs of answer, and carried back and sustained to the complaint. Appellants refusing to plead further, judgment was rendered against them, and in favor of appellees.

The only error assigned is based on the action of the court in carrying back and sustaining to the complaint appellants' demurrer for want of facts to appellees' second and third paragraphs of answer.

Briefly, the facts sufficient to present the question here to be decided may be stated as follows: On March 14, 1906, appellees and Oliver Dedman conveyed certain real estate in Pike county, Indiana, by statutory warranty deed to appel-

lants. It appears that the land was bought and sold as an entirety, and the consideration therefor—\$3,539.88—was paid in gross. The deed recites that the grantors were all the heirs at law of Hiram N. Dedman, deceased. At the time of the execution of the deed, there was a valid judgment against said Oliver Dedman, which was a lien on his interest in the land. Execution was issued on the judgment, and to prevent a sale of that interest, appellants, in May, 1907, were compelled to and did pay and satisfy said execution.

This being an action for damages for breach of covenant against incumbrances, the question for decision is, Shall that covenant in the deed be construed as joint or several?

It is conceded that the grantors acquired title to the land by descent from Hiram N. Dedman, deceased, and that they

held the same as tenants in common. This being true,

1. even though the quantities of their estate or interest may have been unequal, there was unity of possession between them. 1 Washburn, Real Prop. (6th ed.) §876.

They conveyed the land as a common estate. They all joined in a deed, which, by legislative enactment

2. (§3958 Burns 1908, §2927 R. S. 1881), “shall be deemed and held to be a conveyance in fee-simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims.”

The quoted provision of the statute is covered by the words “convey and warrant,” and must be read into the deed as if written therein at full length. *Jackson v. Green* (1887), 112 Ind. 341, 14 N. E. 89; *Dehority v. Wright* (1885), 101 Ind. 382; *Worley v. Hineman* (1893), 6 Ind. App. 240, 33 N. E. 260. The deed contains no special provisions on the part of any of the grantors limiting the broad scope of the

covenant against "all incumbrances," nor is there any covenant inconsistent with the general one in this respect. Consequently, we have before us a deed in which the parties, to express their intention, employed clear and positive language. The subject-matter was the common estate, and a covenant against incumbrances, under our statute for "quiet possession," would attach and run with it. *Whittern v. Krick* (1903), 31 Ind. App. 577, 68 N. E. 694.

Under the facts in this case, each of the grantors, at the time they executed the deed to appellants, had all the rights of a tenant in severalty, except that of sole possession

3. (1 Washburn, Real Prop. [6th ed.] §877); and in the exercise of that right, any one of them might have conveyed his interest, in which case any covenant in the

4. deed would be limited to the interest granted. While such interest could not be conveyed in severalty, or described separately by metes and bounds, yet it would be a transaction within the following rule: "In the case of parties demising or granting the separate interest of each in an estate, the covenant shall be considered co-extensive with the interest granted; and, therefore, these shall be several, where a several interest is granted; and joint, if a joint interest be granted." *Evans v. Sanders* (1850), 49 Ky. 291.

Appellees earnestly insist that the complaint is insufficient, for the reason that it fails to allege that the grantors intended to warrant more than their individual interest, and that it fails to show a consideration for one cotenant to warrant the title of the other.

The rights of the parties must be measured by their agreement as expressed in the deed. If the wording of that instrument was subject to more than one construction, it

5. would be the duty of the court so to construe it as to effectuate the intention of the contracting parties.

But as the language employed is not uncertain, there is no ground for construction, and the contract, as expressed in

the deed, must be enforced as made, although, in the
6. opinion of the court, it may seem in some respects inequitable. *Cravens v. Eagle Cotton Mills Co.* (1889), 120 Ind. 6, 21 N. E. 981, 16 Am. St. 298; *Consolidated Coal, etc., Co. v. Mercer* (1896), 16 Ind. App. 504, 44 N. E. 1005.

As applicable to the facts in this case, Rawle, Covenants (5th ed.) §304, states the law as follows: "Whether the liability created by covenants for title be joint, or several, or joint and several, obviously depends upon the terms in which they are expressed. Where an obligation is created by two or more, the general presumption is that it is joint, and words of severance are required in order to confine the liability of the covenantor to his own acts." In support of this proposition the author cites *Touchstone*, 375; *Carleton v. Tyler* (1839), 16 Me. 392, 33 Am. Dec. 673; *Donahoe v. Emery* (1845), 9 Met. (Mass.) 63, 67; Platt, Covenants 117; *Comings v. Little* (1837), 24 Pick. 266; *Click v. Green & Sadler* (1883), 77 Va. 827. See, also, *City of Philadelphia v. Reeves* (1865), 48 Pa. St. 472; *Ashburn v. Watson* (1911), 8 Ga. App. 566, 70 S. E. 19.

In this case there are no facts before us indicating that the covenants were to be limited to the separate interests, as in the cases of *Redding v. Lamb* (1890), 81 Mich.

7. 318, 45 N. W. 997; *Evans v. Sanders, supra*; but on the contrary, the wording of the deed imports a joint obligation, and under the authorities cited, the demurrer to each paragraph of the complaint should have been overruled.

Judgment reversed, with instructions to overrule the demurrer to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 98 N. E. 367. See, also, under (1) 38 Cyc. 4; (2, 5) 13 Cyc. 601; (3) 38 Cyc. 14; (4) 38 Cyc. 101, 112; (6) 13 Cyc. 604; (7) 11 Cyc. 1055. As to the control of apparent interest in construing a deed, see 31 Am. St. 26.

HARNESS ET AL. v. HARNESS.

[No. 8,284. Filed May 9, 1912.]

1. **BASTARDS.—Legitimation.—Effect.—Right to Inherit from Father Leaving Legitimate Child.**—Where the father of an illegitimate child married its mother and acknowledged the child as his own, such child is deemed legitimate under the provisions of §3001 Burns 1908, §2476 R. S. 1881, and, although the father was thereafter divorced and married another woman by whom he had children who survived him, such child was entitled to inherit from its father and its right was not affected by §3000 Burns 1908, Acts 1901 p. 288, providing that an illegitimate child may inherit from its father who has acknowledged it as his own. except in case the father left surviving legitimate children or descendants of legitimate children. p. 366.
2. **WILLS.—Nature of Title by Devise—"Child".—"Children".**—A title by devise is a title by purchase and not by descent, and the words "child" and "children" ordinarily refer to legitimate children. p. 367.
3. **BASTARDS.—Legitimation.—Effect.—Rights Under Devise to "Children".**—Under the provisions of §3001 Burns 1908, §2476 R. S. 1881, that where a man marries the mother of an illegitimate child, and acknowledges it as his own, such child shall be deemed legitimate, the *status* of the child is fixed for all purposes, so that such child is entitled to an interest in property devised to its father for life with remainder in fee to his "children". pp. 367, 368.
4. **BASTARDS.—Legitimation.—Manner of Acknowledgment.**—An acknowledgment of a bastard child by the father may be by words, or it may be inferred from acts and conduct. p. 368.
5. **WILLS.—Construction.—Intent of Testator.—Designation of Devisees.—"Children".—Illegitimate Child.**—Where, on consideration of a will as a whole, in the light of the circumstances preceding and attending its execution, it appears that the testator, in a devise of land to his son for life with remainder in fee to the son's children, intended to include the son's child of illegitimate birth, such intention prevails and must be given effect. p. 370.
6. **WILLS.—Construction.—Intention of Testator.—Extrinsic Evidence.—Admissibility.**—In an action by an illegitimate child for partition of real estate, evidence that the testator had recognized plaintiff as a grandson, and had evidenced an intention of giving him a share of his estate, was properly admitted as bearing on the question of whether the testator intended to include plaintiff

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in a devise of the land to plaintiff's father for life with remainder in fee to his children. p. 372.

From Clinton Circuit Court; *Henry H. Vinton*, Special Judge.

Action by Arch C. Harness against George S. Harness and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Thomas M. Ryan and *James V. Kent*, for appellants.

Fickle & Arthur and *Joseph P. Gray*, for appellee.

FELT, C. J.—Appellee, Arch C. Harness, filed suit against appellants for partition of real estate, and alleged that he is the owner of the undivided one-fourth part of 159 acres of real estate, as tenant in common with appellants. Issue was formed by general denial.

The court found for appellee, commissioners were appointed, and thirty-nine acres were set off to him in severalty. Judgment of partition, from which appellants appeal, and assign as the only error the overruling of their motion for a new trial.

Appellants asked a new trial for the following reasons: (1) The judgment of the court is contrary to law. (2) The decision of the court is not sustained by sufficient evidence. (3) Error in the exclusion of certain offered testimony.

The undisputed facts show that appellee was born on July 29, 1879; that his mother at the time was not, and had not previously been married; that on February 2, 1880, after bastardy proceedings had been begun by Catherine Harvey, appellee's mother, against Samuel C. Harness, they were duly married; that said Samuel C. Harness was the father of appellee, but did not live with his said wife but a few days, and on October 1, 1880, said Catherine was, by the Cass Circuit Court, granted a divorce from said Samuel C.; that on June 16, 1881, said Samuel C. Harness was duly married to another woman, and to them were born three children, viz., appellants George S. and John O. Harness

and Margaret Dean; that William Harness was the father of Samuel C. Harness and on January 4, 1900, after the birth of all the aforesaid parties to this suit, all of whom were known to said William, he executed his last will and testament, in which he devised the real estate described in the complaint to his son, Samuel C. Harness, for life, "the fee to go to his children at his death"; that William Harness died on March 15, 1905, and his said will was duly probated in the Cass Circuit Court; that Samuel C. Harness died on May 16, 1908, leaving surviving him appellee and his said children by his last marriage; that appellee never lived in the family of Samuel C. Harness, nor was he supported by him, but lived with his mother and her people until able to care for himself; that all the real estate aforesaid was owned by said William Harness.

There is competent evidence tending to prove that said William Harness knew appellee, and the facts and circumstances connected with his birth, and the marriage of his mother and Samuel C. Harness; that said William Harness spoke of appellee as his grandson, and said he would "have something some day"; that appellee was always known by the name Harness; that Samuel C. Harness acknowledged appellee to be his own; that he frequently met him and called him his son, and appellee called him father; that said Samuel C. on several occasions said he would take his son (appellee) into his home, but he feared it might make trouble in the family; that he frequently spoke of appellee to other persons as his son, and manifested interest in his personal welfare and safety.

On this showing appellee is entitled to inherit from Samuel C. Harness, by virtue of §3001 Burns 1908, §2476 R. S. 1881, as a legitimated child, and §3000 Burns 1908,

1. Acts 1901 p. 288, has no application to the case. The full consideration of this question in the case of *Haddon v. Crawford* (1912), 49 Ind. App. 551, 97 N. E. 811, makes it unnecessary further to discuss the question here.

But appellants present the further question of the right of appellee to take title under the will of his grandfather.

It is claimed that the statute by which a child born out of wedlock may inherit from the man who marries its mother, and acknowledges the child as his own, is a part of our law of descent, and in derogation of the common law; that it cannot aid the child to obtain property except by inheritance from such father. It is true the words

2. "child" and "children" ordinarily refer to legitimate children, and that a title by devise is a title by purchase, and not by descent. *Allen v. Bland* (1893), 134 Ind. 78, 33 N. E. 774.

It has been held in this State that the marriage of the mother and the acknowledgment by the father makes the child his heir apparent, removes from it the stain of

3. illegitimacy, and fixes the *status* of the child which cannot thereafter be changed by anything the father or mother may do. *Brock v. State, ex rel.* (1882), 85 Ind. 397.

In *Binns v. Dazey* (1897), 147 Ind. 536, 539, 44 N. E. 644, in considering the statute (now §3001, *supra*), it was said: "The thing to be established under this statute is a legal relation, and not a blood relation, between the alleged father and child. The legal relation arises out of certain facts, namely, the marriage of a man to the mother of a bastard child and the acknowledgment by the man that it is his own. * * * Indeed, the legal relation may be established between the man marrying the mother of a bastard child and such child by the acknowledgment of it as his own by the man, even where the blood relation of father and son does not exist."

In *Latshaw v. State, ex rel.* (1901), 156 Ind. 194, 199, 59 N. E. 471, it is said: "Under our statute a child which is begotten and born out of lawful wedlock is declared to be legitimate, where a man marries its mother and acknowledges such child as his own." The same principle is

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announced in *Bray v. Miles* (1899), 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510.

An acknowledgment of the child by the father may

4. be by words, or it may be inferred from acts and conduct. *Bailey v. Boyd* (1877), 59 Ind. 292, 296.

In *Brock v. State, ex rel., supra*, it is said: “Our statute adopts the rule of the Roman law. * * * This
3. doctrine of the civil law has found great favor in the United States.”

Schouler, *Domestic Relations* (4th ed.) §226, says: “In respect of the legitimation of offspring by the subsequent marriage of their parents, the civil and common law systems widely differ. By the civil and canon laws, two persons who had a child as the fruit of their illicit intercourse might afterwards marry, and thus place their child to all intents and purposes on the same footing as their subsequent offspring, born in lawful wedlock. But the common law, though not so strict as to require that the child should be begotten of the marriage, rendered it indispensable that the birth should be after the ceremony.”

Gates v. Seibert (1900), 157 Mo. 254, 57 S. W. 1065, 80 Am. St. 625, is a well-considered case, and deals with a statute substantially the same as ours. The question there arose on a will, and it was decided that the word “children” included a child born and legitimated under circumstances substantially the same as in the case at bar. This case considers all the objections raised here, and reviews and distinguishes some of the cases cited and relied on by appellant. The Missouri court, among other things, said: “Our statute declares that children born out of wedlock whose parents afterwards married and the father recognizes them as his, ‘shall thereby be legitimated.’ The word is used without qualification or restriction. There are no degrees of legitimacy, a child is either legitimate or it is illegitimate, and whether it is one or the other depends upon whether or not it comes within the requirements of the

law to make it legitimate.” Further on in speaking of children born in lawful wedlock and those legitimized under the statute by marriage and acknowledgment, the court said: “The statute has made them equal before the law and the courts cannot make them unequal. * * * ‘Where a person is once clearly and positively legitimate, he ought not to be bastardized by implication or construction. This rule applies with force to this case. The act of descents and distributions clearly make those children legitimate, and being once clearly so, if they are holden to be otherwise, it can only be by implication, argument and construction.’ Surely it would be strange if the court could in one clause of the opinion be understood to say that the children were legitimate for the purpose of inheriting in case of intestacy but bastards for all other purposes, and in another clause of the same opinion say that they were ‘clearly and positively legitimate.’ * * * The language instead of being susceptible of that construction seems to be clearly to the contrary, declaring the act conferring the legitimacy to be without restriction.”

In the case of *In re Wardell* (1881), 57 Cal. 484, 491, in considering a similar question to that before us, the court said: “By the same agency the *status* of persons who had no rights of inheritance or succession under the common law, has been, under modern law, greatly changed. * * * The legal meaning of the word ‘children’ has, therefore, been greatly enlarged from what it was at common law. * * * But by statute law, the offspring of marriages null in law, * * * children born out of lawful wedlock whose parents subsequently intermarried * * * and children by acknowledgment or adoption of their father * * * are all legitimate. * * * Between them and the legitimate offspring of the same parents the law has established cognatic relations, and either is as capable as the other of exercising inheritable rights. Hence the term ‘children’ as used in

* * * the law of succession, must relate to *status*, not to origin—to the capacity to inherit, not to the legality of the relations which may have existed between those of whom they have been begotten. The word has, therefore, a statutory and not a common-law meaning; and its meaning includes all children upon whom has been conferred by law the capacity of inheritance.”

The reasoning of the Missouri and California cases from which we have quoted is applicable to this case under the statute we are considering. We therefore hold that where a man marries the mother of an illegitimate child, and acknowledges the child as his own, the effect of the statute is to change the legal status of the child from that of illegitimacy to legitimacy; that the status of the child being thus fixed, stands for all purposes; that there are no degrees of legitimacy in this State. See, also, *Miller v. Pennington* (1905), 218 Ill. 220, 75 N. E. 919, 1 L. R. A. (N. S.) 773; *Power v. Hafley* (1887), 85 Ky. 671, 4 S. W. 683; Page, Wills §§522-525; Schouler, Wills (3d. ed.) §534; *In re Winchester* (1903), 140 Cal. 468, 470, 74 Pac. 10.

If we are wrong in the foregoing conclusions, there is another and sufficient ground for the affirmance of the judgment in this case, for if the legitimation of appellee

5. only enabled him to inherit property from his father, as contended by appellants, this would not foreclose the question of his right under the will of William Harness, for notwithstanding the rigid rule of the common law, in reference to illegitimate born children, the intention of the testator remains the pole star in construing a will. If on a consideration of the whole instrument, in the light of the circumstances preceding and attending its execution, it appears that the testator intended to include the child of illegitimate birth, such intention prevails, and must be given effect. *Elliott v. Elliott* (1889), 117 Ind. 380, 20 N. E. 264, 10 Am. St. 54; *Dwight v. Gibb* (1911), 129 N. Y. Supp. 961, 145 App. Div. 223; *Sullivan v. Parker* (1893), 113 N. C. 301, 18

S. E. 347; *Thomas v. Thomas* (1899), 149 Mo. 426, 51 S. W. 111, 73 Am. St. 405, 415; *Smith v. Lansing* (1898), 53 N. Y. Supp. 633, 24 Misc. 566; *In re Morton v. Morton* (1901), 62 Neb. 420, 87 N. W. 182; *Tuttle v. Woolworth* (1908), 74 N. J. Eq. 310, 77 Atl. 684; *Johnstone v. Taliaferro* (1899), 107 Ga. 6, 32 S. E. 931, 45 L. R. A. 95, 104.

Here there is evidence tending to show that the testator knew the parties to this controversy, and all the facts and circumstances relating to them, when he executed his will; that his son acknowledged appellee as his own, and each addressed the other in terms showing the relation of parent and child; that his son manifested an interest in the welfare of appellee, and the testator himself spoke of him in familiar terms, calling him his grandson, and at least on one occasion evidenced an intention of giving him a share in his estate.

In view of all these facts, and other circumstances shown by the evidence, we find no reason for questioning the decision of the lower court, whether based on the intention of the testator or the effect of the statute.

Appellant cites *Thornburg v. American Strawboard Co.* (1895), 141 Ind. 443, 40 N. E. 1062, 50 Am. St. 334, and *McDonald v. Pittsburgh, etc., R. Co.* (1896), 144 Ind. 459, 43 N. E. 447, 32 L. R. A. 309, 55 Am. St. 185, in support of the proposition that appellee cannot take under the will, even if legitimate under the statute of descent. These cases deal with another statute involving the right of a father to bring suit for the death of a minor child.

It is sufficient to say that neither case comes within the provisions of the statute we are considering, for in the former the father is not shown to have acknowledged the child, and is held to be only a step-father, and in the latter case the child was illegitimate, and the father did not marry the mother.

The questions relating to the admission of evidence tending to show the testator's knowledge of appellee, and his

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attitude toward him, present no available error. The testimony was not admitted to change the terms of the will but to determine the intent of the testator, and as such was clearly admissible.

The record shows no available error. The decision of the lower court was clearly right.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 357. See, also, under (1) 5 Cyc. 636; (2) 40 Cyc. 1995, 1451; (3) 5 Cyc. 636; (4) 5 Cyc. 633; (5) 40 Cyc. 1451; (6) 40 Cyc. 1427. As to parol, or extrinsic, evidence to show intent of a testator in respect of whom his will is to benefit, see 145 Am. St. 588. On the question of inheritance by, through, or from illegitimate persons, see 23 L. R. A. 753.

THURMAN ET AL. v. MILLER.

[No. 7,597. Filed May 10, 1912.]

1. TRIAL.—*Venire De Novo*.—*Failure to Find on All the Issues*.—A failure to find on all the issues is not cause for a *venire de novo*. p. 374.
2. TRIAL.—*Verdict*.—*Requisites and Sufficiency*.—*Venire De Novo*.—A verdict, although informal, will be held sufficient and a *venire de novo* will not be granted, if on reasonable intendment it covers the issues and can be understood by the court. pp. 374, 375.
3. REPLEVIN.—*Verdict*.—*Operation and Effect*.—In an action of replevin a general finding in favor of plaintiff is in effect a finding that the plaintiff is the owner of and entitled to the possession of the property in question, but the verdict should find the damages sustained by the detention of the property. p. 374.
4. REPLEVIN.—*Action for Possession of Money*.—*Verdict*.—*Sufficiency*.—*Value of Property*.—In an action of replevin for the possession of money a verdict that the plaintiff was "entitled to recover from the defendants the \$1,270 described in the complaint," and assessing the damages for the detention, was sufficient, since the word "recover" necessarily meant to "recover possession" and the money being lawful money of the United States, a finding as to its value was unnecessary. p. 376.
5. TRIAL.—*Instructions*.—"Preponderance of the Evidence".—An instruction that a "preponderance of the evidence" meant that which was most satisfactory to the minds of the jurors, and which stated that the question should not be determined from

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the number of witnesses that testified for or against any of the points in controversy, but solely from what the jury thought the evidence showed to be the truth in the matter, although a departure from the general definition, was not misleading or harmful. p. 376.

From Pike Circuit Court, *John L. Bretz*, Judge.

Action by Margaret A. Miller against Lee Thurman and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

E. A. Ely and *Frank Ely*, for appellants.

E. P. Richardson and *A. H. Taylor*, for appellees.

ADAMS, J.—This was an action in replevin, whereby appellee sought to recover possession of \$1,270, lawful money of the United States, of the value of \$1,270, which appellee alleged was wrongfully taken and unlawfully detained by appellants. Judgment was demanded for the possession of the money, and damages for its detention.

Appellant Thurman answered the complaint by general denial, and appellant Citizens State Bank filed answer in the form of an interpleader, admitting the custody of the money, but disclaiming any interest therein, and expressing a willingness to deliver the same to the lawful owner thereof, as ordered by the court.

Trial by jury; finding and verdict for Citizens State Bank, and the following further verdict: "We, the jury, find for the plaintiff, that she is entitled to recover from the defendants the \$1,270 described in her complaint, and we assess her damages at the sum of \$1,270 for the detention thereof."

Appellant Thurman filed a motion for a *venire de novo*, which was overruled, and a motion for a new trial, which was likewise overruled. The court rendered judgment on the verdict as follows: "It is therefore considered and adjudged by the court that the Citizens State Bank has no interest in said property, except that the same is held subject to the decision of this court, and that it pay over to the

plaintiff the said \$1,270, and be discharged from further liability therefor. It is further adjudged by the court that the plaintiff recover of and from the defendant Lee Thurman \$1,270 as her damages here, together with all her costs and charges herein laid out and expended." Appellant Thurman alone assigns errors on appeal.

These errors are (1) overruling the motion for a *venire de novo*, and (2) overruling the motion for a new trial.

As to the first error assigned, it has been held that failure to find on all the issues is not cause for a *venire de novo*.

Board, etc., v. Pearson (1889), 120 Ind. 426, 430, 22

1. N. E. 134, 16 Am. St. 325; *Van Grundy v. Carrigan* (1892), 4 Ind. App. 333, 336, 30 N. E. 933.

In general, it is held that a *venire de novo* will not be granted, and a verdict will be held sufficient, if the court can understand it, even though it may be informal.

2. *Jones v. Julian* (1859), 12 Ind. 274; *Purner v. Koontz* (1894), 138 Ind. 252, 36 N. E. 1094.

If, on reasonable intendment, the verdict covers the issues, the court will disregard form, and hold the verdict sufficient. *Chambers v. Butcher* (1882), 82 Ind. 508; *Board, etc., v. Pearson, supra*; *Vanvalkenberg v. Vanvalkenberg* (1883), 90 Ind. 433, 435.

It will be observed that the verdict herein is a general finding in favor of plaintiff, and this, in actions of replevin, is a finding that the plaintiff is the owner of and en-

3. titled to the possession of the property in question.

Van Grundy v. Carrigan, supra; *Washburn v. Roberts* (1880), 72 Ind. 213, 217; *McAfee v. Montgomery* (1898), 21 Ind. App. 196, 198, 51 N. E. 957.

In *Payne v. June* (1883), 92 Ind. 252, 258, it was held that it is unnecessary for the verdict to express a finding on each averment of the complaint, the general finding being sufficient in this respect. And in *Washburn v. Roberts, supra*, it was held that a general finding for the plaintiff is

a finding on all the issues, and is not cut down by special matters stated in the verdict.

In *Crocker v. Hoffman* (1874), 48 Ind. 207, it was held that in an action of replevin, a verdict for plaintiff was, in effect, a finding that plaintiff was the owner and entitled to the possession of the property, but that the verdict should have found the damages sustained by the detention of the property.

In *Kluse v. Sparks* (1894), 10 Ind. App. 444, 449, 36 N. E. 914, 37 N. E. 1047, the court said: "The appellants admitted the detention of the property by denying appellee's claim of ownership set up in the complaint. The only question as to such detention was whether it was lawful or unlawful, and this question was involved in and decided by the finding that the plaintiff was the owner, and entitled to the possession of the property."

In *Mitchell v. Burch* (1871), 36 Ind. 529, the verdict was as follows: "We, the jury, find the property replevied to

be the property of the plaintiff, and assess his dam-

2. ages at twenty-five dollars, and assess his damages for the detention thereof at twenty-five dollars. * * *

We the jury, find the nine hogs not replevied to be the property of the plaintiff, and are of the value of ninety-five dollars, and assess his damages for the detention thereof at ninety-five dollars." In passing on the motion for a *venire de novo*, the court said: "It would have been better to have embraced the entire finding in one verdict, but the form adopted does not vitiate the verdict. * * * Whatever uncertainty there was in the verdict as to the damages was remedied and rendered certain by the court only rendering judgment for twenty-five dollars. If a verdict can be understood, it will be sustained although informal, but if so uncertain that it cannot be understood it will be set aside."

From the character of this action, we must assume that the money in question constituted a special deposit in bank.

The jury found that plaintiff was "entitled to recover from the defendants the \$1,270 described in the complaint". Used in this connection, the word "recover" must be taken to mean "recover possession". The \$1,270 was described in plaintiff's complaint as "lawful money of the United States", and being such, it was unnecessary for the jury to find the value of such money. There was no error in overruling the motion for a *venire de novo*.

The only objection urged under the second specification of error is that the court erred in giving to the jury of its own motion instruction eleven. By instruction ten
5. the court fully and correctly told the jury how it should consider and weigh the evidence, and determine from the preponderance thereof the rightful owner of the property in dispute. Instruction eleven is as follows: "By a preponderance of the evidence is meant that which is most satisfactory to your minds, and, in determining that question, you have no right to count the number of witnesses that have testified for or against any of the points in controversy, but determine it solely and alone from what you think the evidence shows the truth to be in the matter."

This instruction is a departure from the usual method of defining preponderance of evidence. It is clear that to preponderate is to outweigh, and yet we would hesitate to say that the language used in the instruction does not mean the same thing, or that evidence most satisfactory to the minds of the jury is not evidence having the greater weight.

The court was right in saying to the jury that in determining the preponderance of the evidence "you have no right to count the number of witnesses that have testified for or against any point in controversy." Determining the preponderance of the evidence by the greater number of witnesses testifying for or against any matter in controversy, has been held to be an erroneous test, even in a case where the witnesses are of equal intelligence and credibility, with equal opportunities of knowledge of the matters about which

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they testify, and testifying with equal candor, intelligence and fairness, and all other things being equal in all respects. *Warren Construction Co. v. Powell* (1909), 173 Ind. 207, 214, 89 N. E. 857; *Cincinnati, etc., R. Co. v. McCullom* (1911), 47 Ind. App. 184, 93 N. E. 1033. The single purpose of the jury is to ascertain the truth, if possible; but where the testimony is conflicting, the verdict must rest on the greater weight of all the evidence.

The jurors were not told in this instruction to find a verdict which would be most satisfactory to their minds, as in the case of *Nickey v. Steuder* (1905), 164 Ind. 189, 73 N. E. 117, disapproved by the Supreme Court, but to determine the preponderance alone from what the evidence shows the truth to be. While not commending the instruction, we cannot believe that it was misleading to the jury, or that it was harmful to appellant Thurman.

The judgment is affirmed.

NOTE.—Reported in 98 N. E. 379. See, also, under (1) 29 Cyc. 816; (2) 29 Cyc. 817; (3) 34 Cyc. 1525, 1537; (4) 34 Cyc. 1533; (5) 38 Cyc. 1750. As to money as the subject of replevin, see 80 Am. St. 757.

BEECH GROVE IMPROVEMENT COMPANY v. THE TITLE GUARANTY AND SURETY COMPANY.

[No. 7,584. Filed May 10, 1912.]

1. **PRINCIPAL AND SURETY.—Bonds.—Construction.**—The rules, that where a bond admits of two constructions, it should, as against a construction which results in injustice and inequity, be fairly and equitably construed, and that its construction should be favorable to the obligee, if consistent with the objects for which the bond was given, have no application to bonds, the terms of which are certain, definite and unambiguous. p. 381.
2. **CONTRACTS.—Construction.—Intent of Parties.**—The intent of the parties to a contract must be ascertained, if possible, by the language used therein, and not by reading into it words that import an intent wholly unexpressed when the contract was exe-

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cuted, but suggested by some apparent hardship in the enforcement thereof. p. 381.

3. **PRINCIPAL AND SURETY.**—*Building Contractor's Bond.*—*Conditions.*—*Notice of Breach.*—*Failure to Give.*—*Effect.*—Where a building contractor's bond provided that no liability should attach to the surety unless in the event of the principal's default, notice thereof should be given the surety by the obligee within thirty days thereafter and before making final payment to the principal, and that the surety should have the right to assume and complete the contract, such provisions were valid and binding, and a failure of the obligee to give such notice relieved the surety from liability. p. 382.

From Superior Court of Marion County (76,750); *Clarence E. Weir*, Judge.

Action by Beech Grove Improvement Company against The Title Guaranty and Surety Company and another. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Morris M. Townley, for appellant.

Caleb S. Denny and *George L. Denny*, for appellee.

HOTTEL, J.—Appellant brought this action against appellee and Charles S. Pollard, to recover on a bond given by said Pollard as principal and appellee as surety to secure the faithful performance of a building contract.

The complaint is in two paragraphs, each of which alleges the execution of a building contract between appellant and Pollard, and also the bond, and embodies therein each of said writings.

The sufficiency of either of the paragraphs is not questioned, and their difference is unimportant for the purpose of determining the questions presented by this appeal.

The breaches of the bond charged, for which a recovery is sought, are the same in each paragraph.

It was agreed between appellant and appellee that Pollard is insolvent, and that there should be a dismissal as to him, without prejudicing appellant's right to proceed against appellee.

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The contract between appellant and Pollard contained the following provision :

“ARTICLE VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, towit: All work under this contract to be completed on or before September 18, 1907.”

The condition of the obligation of the bond contained the following proviso: “Provided, however, that this bond is issued subject to the following conditions and provisions.”

These conditions and provisions, important and controlling in the determination of the question presented, are as follows: “First: That no liability shall attach to the Surety hereunder unless, in the event of any default on the part of the Principal in the performance of any of the terms, covenants or conditions of the said contract, the Obligee shall promptly and immediately upon knowledge thereof, and in any event not later than thirty days after the occurrence of said default, deliver to the Surety at its office in the city of Scranton, Pa., written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said Obligee shall deliver written notice to the Surety at its office aforesaid before making to the Principal the final payment provided for under the contract herein referred to.

Second: That in case of such default on the part of the Principal the Surety shall have the right, if he so desire, to assume and complete or procure the completion of said contract.”

An answer was filed in two paragraphs, the first of which was addressed to the first paragraph of complaint, and the second to the second paragraph of complaint. Each of these paragraphs of answer admitted the execution of the bond in suit and its breaches, and, in addition thereto, set out the provisions of the contract, *supra*, which provided that the work should be done on or before September 18, 1907,

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and the conditions of the bond, *supra*, and averred that said Pollard defaulted as to said covenant and condition, in that he did not complete the work in said contract on or before September 18, 1907, but that he continued to work on said building for a period of about eighty days thereafter, when he abandoned the work thereon, and left said building unfinished and unfit for occupancy; that appellant did not notify appellee promptly, and immediately on knowledge thereof, nor within thirty days after September 18, 1907, said Pollard failed to complete the work under said contract on or before said date, and did not notify appellant of said default until January 14, 1908; that prior to said notice said Pollard had abandoned the work under said contract, and had left said building in an unfinished condition.

A demurrer was filed to each of these paragraphs, which was by the court overruled and exception saved to each ruling. Appellant refused to reply, and elected to stand on the court's rulings on said demurrer, and there was judgment for appellee against appellant for costs. The rulings on said demurrers present the only error relied on by this appeal.

The entire question, therefore, depends on the effect to be given to the above provisions of the bond. Appellee contends that Pollard's failure to complete the building on September 18, 1908, the date specified by the contract for said completion, was such a default as entitled it (appellee) to immediate notice, or at least notice not later than thirty days after the default, and that the failure to give such notice discharged it from all liability whatever as surety on said bond. Appellant on the other hand, contends that each paragraph of the complaint shows that as to the particular breaches of the contract, for which recovery of damages is asked, appellant served the proper notice on the surety company, and that therefore neither paragraph of the answer is

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sufficient to constitute a defense to the paragraph of complaint to which it is addressed.

The effect of appellant's contention is, (1) that where a contract admits of two interpretations, a fair and equitable construction should be adopted as against a construction which results in injustice and inequity; (2) that where a bond is open to two constructions, one favorable to the surety, and one to his obligee, that a construction favorable to the obligee, if consistent with the objects for which the bond was given, should be adopted, for the reason that the instrument which the court is called on to interpret was drawn by the attorneys, officers or agents of the surety company.

These principles of construction, as applied to contracts, the terms of which are ambiguous and uncertain, are based on reason and authority, and in cases where they have application are important and controlling, but they have no application to contracts the terms of which are certain, definite and unambiguous.

While the intent of the parties to a contract is always important and controlling, this intent must be ascertained, if possible, by the language which the parties have themselves adopted and used in such contract, and not by reading into the contract words that import an intent wholly unexpressed when the contract was executed, but suggested by some apparent hardship in the enforcement thereof. *Nave v. Powell* (1913), 52 Ind. App. —, 96 N. E. 395; *Brown v. Russell & Co.* (1886), 105 Ind. 46, 52, 4 N. E. 428; *Conant v. National State Bank* (1889), 121 Ind. 323, 324, 327, 22 N. E. 250; *Shirk v. Mitchell* (1894), 137 Ind. 185, 190, 36 N. E. 850; *Reeves & Co. v. Byers* (1900), 155 Ind. 535, 58 N. E. 713; *Sullivan Mach. Co. v. Breeden* (1907), 40 Ind. App. 631, 82 N. E. 107.

A bond containing a provision identical with the provision in the bond here involved was construed, and the same

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question here presented, determined adversely to appellant's contention in the case of *United States Fidelity, etc., Co. v. Rice* (1906), 148 Fed. 206, 78 C. C. A. 164. The court in that case said: "The parties, by clear and unambiguous language, contracted that no liability should attach to the surety company unless it received notice of any default on the part of the contractor promptly upon knowledge thereof by the owner, and, in any event, not later than thirty days after such default to the end that it might avail itself, if it desired, of the opportunities furnished by the bond for protecting itself. We think that stipulation of the contract was as binding upon the owner as the obligation to pay was upon the surety company. It was a most reasonable stipulation. Its purpose was to protect the surety company against the consequences of any default by providing that, on the occasion of any default whatsoever, it might have the opportunity of determining its effect upon its own liability and of acting accordingly. It may well be that if the surety company had been notified promptly, as required by the bond, of the default by the contractor in failing to complete the building by December 1, it would have assumed the completion of the building, prevented further payments by the owner to the contractor, and at least secured the sum of \$2,899.50 which was paid to the contractor after the default, and to that extent have diminished its own liability. However that may be, the parties contracted for no liability on the bond unless such notice should be given. It was not given, and, in our opinion, that fact conclusively exonerates the surety company from liability. The time for giving the notice, at any rate the ultimatum of thirty days after any default, was from the nature of the case intended to be and was of the essence of the contract. Whether the notice should be given before the expiration of thirty days might depend upon the owner's knowledge of an existing default, and whether it was 'promptly' given after such knowledge had been ac-

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quired might depend on many considerations, and be a debatable question of fact. But obviously the surety company had a purpose in binding the owner to give notice of any default—at the latest—within thirty days thereafter. The imposition of that duty upon the owner tended to insure inspection of the work by the owner, prevent indifference on his part concerning its progress, and to afford the surety company an opportunity to protect itself as provided in the bond.” To the same effect see *National Surety Co. v. Long* (1903), 125 Fed. 887.

As directly opposed to the holding of these cases appellant cites the following cases: *Monro v. National Surety Co.* (1907), 47 Wash. 488, 92 Pac. 280; *Heffernan v. United States Fidelity, etc., Co.* (1905), 37 Wash. 977, 79 Pac. 1095; *Van Buren County v. American Surety Co.* (1908), 137 Iowa 490, 115 N. W. 24, 126 Am. St. 290.

In the case of *Knight & Jillson Co. v. Castle* (1909), 172 Ind. 97, 105, 109, 87 N. E. 976, 27 L. R. A. (N. S.) 573, our Supreme Court expressly disagreed with the reasoning of the Washington cases, and, in effect, adopted the rule laid down in the *United States Fidelity, etc., Co. v. Rice, supra*.

See this case and authorities there cited.

This court also in the case of *National Surety Co. v. Schneiderman* (1911), 49 Ind. App. 139, 96 N. E. 955, recognized and followed the rule announced by the Supreme Court in said case of *Knight & Jillson Co. v. Castle, supra*.

Upon the authority of these cases this judgment must be affirmed.

NOTE.—Reported in 98 N. E. 373. See, also, under (1) 5 Cyc. 753; (2) 9 Cyc. 577; (3) 32 Cyc. 176. As to the rules for construing a written contract, see 56 Am. Dec. 618. As to the duty of a creditor to give the surety notice of the principal's default, see 115 Am. St. 94.

HENDERSON v. BIVENS ET AL.

[No. 7,521. Filed May 14, 1912.]

1. APPEAL.—*Subsequent Trial.—Law of the Case.*—The decision of the court on appeal is the law of the case on all questions determined thereby, and where the court on appeal decided that the verification of the county treasurer's return of delinquent lands was not necessary to a valid sale of such lands for taxes, it is controlling on a subsequent trial. p. 385.
2. TAXATION.—*Tax Deed.—Evidence.*—A tax deed is *prima facie* evidence of the regularity of the sale, of all prior proceedings, and of the title thereby conveyed. p. 386.
3. TAXATION.—*Tax Sales.—Validity.—Burden of Proof.*—The party attacking the validity of a tax sale has the burden to show by competent proof the invalidity of the sale to give title. p. 386.

From Shelby Circuit Court; *Will M. Sparks*, Judge.

Action by William E. Henderson against Absent Bivens and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Charles B. Clarke, Walter C. Clarke, Wray & Campbell, for appellant.

William V. Rooker, for appellees.

FELT, C. J.—This is a suit in ejectment by appellant against appellees. Answer, general denial. Trial by jury and verdict for appellees, in pursuance of a peremptory instruction directing the verdict.

A motion for a new trial was overruled, and the court's action in so doing is the error relied on for reversal.

This is the second appeal in this case. *Bivens v. Henderson* (1908), 42 Ind. App. 562, 86 N. E. 526.

Several reasons were assigned for a new trial, all of which relate either directly or indirectly to the exclusion of certain testimony offered by appellant, who asserts title to the one-fifteenth part of the real estate involved in the suit.

Appellees hold title by virtue of a tax deed, and appellant's contention is that the deed is ineffectual to convey

title, because of irregularities in the tax sale by reason of which the deed was made.

Appellant's counsel in their brief say: "The only defect appellant's counsel could find in the proceedings leading up to the tax-sale in 1891 was the failure of the county treasurer to verify, by oath or affirmation, as required by law, his return of lots and lands delinquent for that year. Repeated efforts were made on appellant's part to make this proof, but the court below ruled that the proffered evidence was inadmissible. In line with the ruling was the peremptory instruction given by the court directing the jury to return a verdict for defendants. * * * Our contention is that the absence of such a verified 'return' vitiated the whole sale."

The testimony excluded by the court was an offer to prove by two deputy auditors of Marion county, Indiana, that the treasurer's return of lands and lots delinquent for non-payment of taxes for the years 1889 and 1890 was not verified as required by the statute.

Appellees insist that the decision rendered by this court on the former appeal is the law of the case, and that the questions now raised by appellant were settled

1. adversely to him by that decision. If the questions now presented were determined by the former decision, the law of the case is settled. In that opinion the court said: "The only attack made by appellee upon McGruder's title under his tax deed was proof that the treasurer of Marion county failed to verify by his oath or affirmation, his return of said taxes as delinquent." The court then considered the two sections of the statute (§§8571, 8572 Burns 1901, Acts 1891 p. 199, §§153, 154) and decided that the verification contended for by appellant was found only in the latter of the two sections which provides the manner in which a county treasurer may obtain credit in his settlement for delinquent

taxes, and said: "It will be observed that the first section of the statute quoted does not require the return by the treasurer of the delinquent taxes to be verified by his oath, and it is this section that governs the proceedings in the collection of the taxes. * * * And it will also be observed that the first section, by its clear and express terms, can apply only to resident delinquents."

It was shown that the alleged owner at the time of the sale was a resident of the State of Kansas. The court clearly decided that the verification of the return was not necessary to a valid sale, and was not required by the section of the statute controlling the question. Also, that the statute applied only to resident delinquents. No other defects in the sale are, or were suggested. The question of the admissibility of proof showing the want of such verification is therefore *res adjudicata*, and the offered evidence immaterial to the question in issue.

The tax deed was *prima facie* evidence of the regularity of the sale, of all prior proceedings, and of the title thereby conveyed. *Bivens v. Henderson, supra*, 572.

The burden was on appellant to show by competent proof the invalidity of the sale to give title, and, failing to offer such testimony, the court did not err in excluding the offered evidence or in directing the verdict. On the questions presented to the trial court, the former decision was the law of the case.

The rulings on the other questions presented by the motion for a new trial are necessarily determined by the foregoing propositions.

The court did not err in overruling the motion for a new trial.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 421. See, also, under (1) 3 Cyc. 472; (2) 37 Cyc. 1457; (3) 37 Cyc. 1377, 1461. As to the effect of recitals in a tax deed, see 31 Am. St. 233.

TONER v. WHYBREW ET AL.

[No. 7,604. Filed May 14, 1912.]

1. **APPEAL.—Briefs.—Waiver of Error.**—Error assigned, but not urged in appellant's brief, is waived. p. 390.
2. **APPEAL.—Assignment of Errors.—Waiver.—Effect on Other Assignment Presenting Same Question.**—Appellant's waiver of error in the court's ruling on demurrer to a paragraph of complaint proceeding on appellant's right to a lien on a building erected on appellee's premises, did not operate as a waiver of his right to present the same question by assignment of error in overruling his motion to modify the judgment and decree so as to give him a lien on the building and an order for the sale thereof to satisfy the lien. p. 390.
3. **MECHANICS' LIEN.—Statutory Right.**—The lien of a mechanic or materialman has its existence by virtue of the statute alone. p. 392.
4. **MECHANICS' LIEN.—Statutory Right.—Determination of Persons Entitled to Lien.—Construction of Statute.**—A mechanic's lien is in derogation of the common law, and no one is allowed its benefits except those who are embraced within its provisions, and, in ascertaining who such persons are, the statute is strictly construed. p. 392.
5. **MECHANICS' LIEN.—Rights of Mechanic.—Construction of Statute.**—Where a mechanic or materialman clearly comes within the provisions of the mechanic's lien statute, the statute is given a liberal construction to the end that he shall have the protection the statute was intended to give. p. 392.
6. **MECHANICS' LIEN.—Lien for Materials.—Building on Land Held Under Contract of Purchase.—Statute.**—The provisions of §8295 Burns 1908, Acts 1899 p. 569, and §8296 Burns 1908, Acts 1889 p. 259, giving to materialmen a lien upon the building for which materials are furnished by them, and on the interest of the owner of the land on which it stands or with which it is connected to the extent of the value of such materials, and providing that where the owner has only a leasehold interest, or the land is encumbered by mortgage, the lien, so far as concerns the building, is not impaired by forfeiture of the lease or foreclosure of the mortgage, but that such building may be sold to satisfy the lien, do not apply in favor of one furnishing materials for a building erected by a vendee in possession of the land under a contract of purchase, such vendee having contracted for the materials on his own behalf and not as the agent of the vendor. pp. 393, 394.

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7. **MECHANICS' LIEN.**—*Right to Lien.*—*Consent of Owner.*—*Statute.*—In order that a lien may attach to property under §8295 Burns 1908, Acts 1899 p. 569, for material furnished in a building erected thereon, the material must be furnished by the authority and direction of the owner, his mere inactive consent being insufficient. p. 394.

From Fulton Circuit Court; *Harry Bernetha*, Judge.

Action by Albert D. Toner against Walter Whybrew and others. From a judgment for plaintiff against defendant Whybrew and in favor of his co-defendants, the plaintiff appeals. *Affirmed.*

A. D. Toner, Jr., and I. Conner, for appellant.

David E. Rhoades and John F. Lawrence, for appellees.

HOTTEL, J.—Appellant brought this action against appellee Whybrew to foreclose a materialman's lien. Joseph Musselman and Anna Musselman, his wife, were made parties to the action to answer as to any interest which they might claim in the property in question and are the active appellees in this appeal. They also filed a cross-complaint, asking that title to the property be quieted in them.

The cause was tried by the court, which rendered a general finding, and found for appellant as against appellee Whybrew, and rendered personal judgment against said Whybrew, but on the cross-complaint, found that appellees Musselman and Musselman were the owners of the property in question, free of any claim of appellant under the materialman's lien sued on, and rendered judgment for appellees. Appellant accordingly moved to modify the court's finding and judgment so as to entitle appellant to the sale of the building erected on the real estate described in the complaint. This motion and the motion for a new trial were overruled and appellant now relies on and urges error in each of such rulings.

The material facts in this case are as follows: On April 6, 1903, appellees Musselman and Musselman, then owners by entireties of the real estate described in the complaint,

entered into a contract, in the nature of a title bond, with appellee Whybrew, and therein agreed to sell the real estate to him, Whybrew contracting to pay for the same in seven annual payments of \$100 each, and to assume and pay a certain mortgage thereon. The contract further provided that should Whybrew fail to pay said mortgage when due, or should he fail to make any annual payment thereunder according to the terms of the contract, and said default should continue for twenty days, the vendors might take possession of said real estate, and all payments made should be considered as rent, and should belong to vendors, and from that time the contract should be annulled, and the purchasers should have no rights whatever in said lands or in payments theretofore made. The contract also contained the following provision: "The year he (Whybrew) builds on the place he need not pay any part of the principal, provided said building shall be worth \$100, and shall pay the interest due and all the payments shall be extended one year."

This contract was placed of record.

Whybrew took full possession of the real estate under the contract, and continued in possession thereof until February 24, 1905. In the fall of 1903 he built a frame dwelling house on said land, and used in its construction the materials sold to him by appellant. On January 2, 1904, within the time allowed by law, appellant filed notice of his intention to hold a lien on the real estate and improvements for the value of the materials furnished. Aside from the initial payment of \$100, Whybrew made no payments in accordance with the terms of the contract, and on February 24, 1905, moved off of the property, and surrendered possession to the Musselmans. During his occupancy of the property he received in rents and profits therefrom, a sum considerably larger than that which he paid on the contract.

The motion to modify, on which the error is predicated, is not merely a motion to modify the judgment, but is a motion

to modify the general finding and judgment so as to show certain enumerated facts, as well as additional provisions in the judgment and decree.

Whether the independent question of error on account of a refusal of the lower court to modify its judgment on proper motion is before this court, is open to doubt, but the motion is lengthy, and a discussion of this phase of the case is unimportant, in view of the conclusion we have reached on the merits of the case.

The complaint in this case was in three paragraphs. The third paragraph, which sought the enforcement of the lien as against the building alone, was held insufficient as against demurrer. Appellees filed a cross-complaint, setting up the facts substantially as we have indicated them in the statement of facts above. A demurrer to this cross-complaint was overruled by the court below. Appellant, in his

1. brief, urges neither the ruling on the demurrer to his third paragraph of complaint, nor the ruling on the demurrer to appellees' cross-complaint, as error. These assigned errors are therefore waived. In this connection appellees insist that by waiving these assigned errors appellant has also waived the error on the motion to modify.
- 2.

The third paragraph of the complaint, proceeding on the theory of appellant's right to a lien only on the building erected on appellees' premises, presented the alleged error relied on at the point of its origin in the lower court. After sustaining the demurrer to this paragraph, the court, if right in this ruling, properly overruled the motion to modify the finding and judgment, the purpose of such motion being to have the judgment and decree modified so as to give to appellant a lien on said building and an order of sale of the building to satisfy the same.

While the question sought to be presented by the motion to modify might have been more properly presented by the other rulings, yet we do not understand that a waiver of

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the presentation of the other rulings necessarily waives a presentation of this alleged error, even though the same question is attempted to be presented thereby.

The question we are asked to determine is, Does a materialman who furnishes materials used in a building erected on real estate by a vendee in possession thereof, under a contract of purchase, thereby obtain a lien *on such building* to the extent of the material furnished and used therein, as against the legal owner and vendor of such real estate, after a surrender to him of the possession and rights of such vendee under his contract of purchase, when such material was furnished under a contract with such vendee alone, such vendee having made such contract in his own behalf and not as the agent of the vendor?

The answer to this question depends on the construction to be given to our mechanics' lien statutes. These sections, and the parts of the same, here involved, are as follows: §8295 Burns 1908, Acts 1899 p. 569. "That contractors, subcontractors, mechanics, journeymen, laborers and all persons performing labor or furnishing material or machinery for the erection, altering, repairing or removing any house, mill, * * * may have a lien separately or jointly upon the house, mill, * * * which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, material furnished, or either * * *." §8296 Burns 1908, Acts 1889 p. 259. "The entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith, shall be subject to lien to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or material furnished; and where the owner has only a leasehold interest, or the land is incumbered by mortgage,

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the lien, so far as concerns the buildings erected by said lien-holder, is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and removed within ninety days after the sale by the purchaser.”

The lien of a mechanic or materialman has its existence by virtue of statute alone. *Davis & Rankin Bldg., 3. etc., Co. v. Vice* (1896), 15 Ind. App. 117, 44 N. E. 889; *Clark v. Huey* (1895), 12 Ind. App. 224, 232, 40 N. E. 152; *Potter Mfg. Co. v. A. B. Meyer & Co.* (1909), 171 Ind. 513, 516, 86 N. E. 837, 131 Am. St. 267.

This lien is in derogation of the common law, and no one is allowed its benefits except those who are embraced within its provisions, and, in ascertaining who such persons 4. are, the statute is strictly construed. *Cincinnati, etc., Railroad v. Shera* (1905), 36 Ind. App. 315, 75 N. E. 293; *Krotz v. A. R. Beck Lumber Co.* (1905), 34 Ind. App. 577, 73 N. E. 273; *Potter Mfg. Co. v. A. B. Meyer & Co., supra.*

But where it is clear that one falls within the protection of the statute, then the statute is liberally construed to the end that such mechanic or materialman shall have the 5. protection which the statute was intended to give. *Potter Mfg. Co. v. A. B. Meyer & Co., supra; Clark v. Huey, supra.*

We can hardly say that we have found a decision of the Supreme Court or this court exactly decisive of the question here involved, and there is much confusion in the decisions of other states on the question, some of these courts having reversed themselves one or more times on the question, notably the courts of Missouri and Massachusetts. We cite some of the cases where this question has been presented and discussed. *Galveston Exhibition Assn. v. Perkins* (1891), 80 Tex. 62, 15 S. W. 633; *Wagar v. Briscoe* (1878), 38 Mich. 587; *Jossman v. Rice* (1899), 121 Mich. 270, 80 N. W. 25,

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80 Am. St. 493; *Hayes v. Fessenden* (1870), 106 Mass. 228; *Forbes v. Mosquito Fleet Yacht Club* (1900), 175 Mass. 432, 436, 56 N. E. 615; *Rees v. Ludington* (1860), 13 Wis. 276, 80 Am. Dec. 741; *Jessup v. Stone* (1861), 13 Wis. 521; *Shapleigh v. Hull* (1895), 21 Colo. 419, 41 Pac. 1108; *McGreary v. Osborne* (1858), 9 Cal. 119; *Jodd v. Duncan* (1880), 9 Mo. App. 417; *Sawyer-Austin Lumber Co. v. Clark* (1899), 82 Mo. App. 225; *Ranson v. Sheehan* (1883), 78 Mo. 668; *Kansas City Hotel Co. v. Sauer* (1877), 65 Mo. 279; *Mayes v. Murphy* (1902), 93 Mo. App. 37; *Pickens v. Platts-mouth Investment Co.* (1893), 37 Neb. 272, 55 N. W. 947; *Pinkerton v. Le Beau* (1893), 3 S. D. 440, 54 N. W. 97; *Ah Louis v. Harwood* (1903), 140 Cal. 500, 74 Pac. 41; *Joplin Supply Co. v. West* (1910), 149 Mo. App. 78, 130 S. W. 156.

For a summary of the holding of the court in some of the cases, *supra*, see note to case of *Zabriskie v. Greater Am. Expo. Co.* (1903), 62 L. R. A. 369.

We think the weight of authority in other jurisdictions, having mechanics' lien statutes similar to ours, is against appellant's contention. But, independent of the au-
 6. thorities of other jurisdictions, we feel that while as above stated, the courts of this State have not in any particular case decided the exact question here presented, yet the decisions of the Supreme Court and this court on analogous and similar questions, when considered together, in effect settle the question against appellant's contention.

In construing §8295, *supra*, both of said courts have held that in order that the lien might attach to property for ma-
 terial used in a building erected thereon, it was nec-
 7. essary that such material should be furnished by the authority and direction of the owner, and that something more than mere inactive consent on the part of such owner was necessary in order that such lien might be acquired against him. *Clark v. Huey, supra*; *Neeley v. Sea-*

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right (1888), 113 Ind. 316, 318, 15 N. E. 598; *Foster Lumber Co. v. Sigma Chi Chapter House* (1912), 49 Ind. App. 528, 97 N. E. 801, 802.

It has been held that where a person is in possession of real estate under a contract of purchase and title bond, he

could not defeat or cloud the vendor's title by suf-

6. fering a mechanic's lien to be filed against the real estate for improvements made thereon. *People's Sav., etc., Assn. v. Spears* (1888), 115 Ind. 297, 17 N. E. 570; *Rusche v. Pittman* (1904), 34 Ind. App. 159, 72 N. E. 473.

The fact that "the purchaser in possession under a contract of purchase made improvements or repairs with the knowledge and consent of the vendor, did not estop the latter to assert its prior title. Something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of property." *People's Sav., etc., Assn. v. Spears, supra*. See, also, *Neeley v. Searight, supra*.

In discussing §8296, *supra*, and its application to a contract similar to that here involved, this court in the case of *Davis v. Elliott* (1893), 7 Ind. App. 246, 248, 34 N. E. 591, said: "Counsel for appellants, however, insist that by this statute the law has been changed, and that they are entitled to a lien against the buildings, although not against the land. They urge that they can see no reason why the legislature should give the mechanic a lien on the buildings as against a prior mortgagee or a lessor by an ordinary lease, and not as against the vendor by executory contract. While this proposition might well be answered in the affirmative, still the rights of parties are to be determined not by what the legislature might well have done, but by what it has actually done. It is argued that the term 'leasehold', as used in this statute, 'should be so construed by this court as to include cases like the one in question, construing the word to have a broad enough significance to cover any case where the party was in lawful possession of

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the real estate under a contract for the sale of land or otherwise.' No authority is cited in support of this proposition. Nor do we deem the court justified in giving to the term 'leasehold' such a broad interpretation. To do so would be doing the extremest violence to the provisions of the statute. It is the province of the legislature and not of the court to define the cases in which a first lien shall attach to the buildings. This the legislature has done in language plain and unambiguous, leaving no room for judicial construction. The word used is one in common use, the meaning of which is generally understood both by members of the legal profession and others. The right created by the contract in this case is entirely destitute of any characteristic feature of a leasehold interest. It is simply an executory contract of purchase and sale: Only this and nothing more."

These authorities sustain the ruling of the court below on appellant's motion to modify the judgment.

Appellant next insists that the decision of the court was contrary to law and not sustained by the evidence. What we have said on the other branch of the case would prevent a reversal of the judgment on either of these grounds.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 450. See, also, under (1) 2 Cyc. 1014; (3) 27 Cyc. 18; (4) 27 Cyc. 82; (5) 27 Cyc. 20; (6, 7) 27 Cyc. 59, 60. For a discussion of mechanics' liens on buildings or improvements as distinct from the land on which it is located, see 2 Ann. Cas. 689. As to the existence and extent of mechanics' liens at common law, see 35 Am. Rep. 362. As to the estate of lessee covered by a mechanic's lien, see 45 Am. Dec. 678.

High Wheel Auto, etc., Co. v. Journal Co.—50 Ind. App. 398.

**HIGH WHEEL AUTO PARTS COMPANY ET AL. v.
JOURNAL COMPANY OF TROY.**

[No. 7,605. Filed May 14, 1912.]

1. **CONTRACTS.** — *Mutuality.* — “*Unilateral Contract.*” — The term “unilateral contract” is a legal solecism that has come into use as expressing the idea of a contract lacking in mutuality. p. 398.
2. **CONTRACTS.** — *Acceptance.* — *Mutuality.* — Where a contract or order is signed by one of the contracting parties, and accepted by the other, and affirmative acts constituting the consideration done by the latter, the party signing cannot assert a want of mutuality in the instrument. p. 398.
3. **CUSTOMS AND USAGES.** — *Operation.* — *Construction of Contract.* — A custom or usage long continued and uniform, generally known and acquiesced in, may be shown in a proper case, where there is doubt in construing a contract or in ascertaining the manner of discharging some duty. p. 399.
4. **CUSTOMS AND USAGES.** — *Customs Relating to Matters of Law.* — Proof of a custom will not be received when in conflict with well settled rules of law. p. 399.
5. **CUSTOMS AND USAGES.** — *Operation.* — *Unambiguous Contract.* — *Answer.* — In an action on a contract for space at an exhibition, where the contract contained a direct and positive promise to pay an amount certain at a time certain without conditions or qualifications, an answer alleging certain customs of the trade, exempting defendants from the obligation to pay for such space, was insufficient, since the parties had a right to contract against custom and the contract was not open to construction or explanation. p. 400.

From Delaware Circuit Court, *Joseph G. Leffler*, Judge.

Action by the Journal Company of Troy against the High Wheel Auto Parts Company and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

George H. Koons and *George H. Koons, Jr.*, for appellants.

John W. Ryan and *Thomas L. Ryan*, for appellee.

ADAMS, J. — During the week of October 5-10, 1908, appellee managed an automobile exhibit at Grand Central Palace, New York. Appellant, High Wheel Auto Parts Com-

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pany, was a manufacturer of automobiles, and desired to make a display at this exhibition. On August 8, 1908, appellants sent the following order to appellee:

“Muncie, Ind., Aug. 8, 1908.

Journal Company of Troy,
Troy, N. Y.

Gentlemen:—You will please reserve for us 234 square feet of space in 44th St., Section Main Exhibit floor, as per diagram below, for which we agree to pay you at the rate of One Dollar (\$1.00) per square foot, total \$234.00.

TERMS—25 per cent to accompany signed contract; balance on Saturday, August 1, 1908. The rules and regulations printed on the last page of this contract form a part thereof.

9 ft. front,
26 “ deep

HIGH WHEEL AUTO PARTS CO.,
H. L. Warner, Mgr.”

This order is made a part of the complaint, and it is averred that on receipt thereof appellee at once set apart the space in the exhibition building numbered and described in the contract, and held the same for appellants, unoccupied and unused by any other exhibitor during the exhibition.

It is also averred that twenty-five per cent of the contract price accompanied the order; that appellants have failed and refused to pay the balance, after demand, and that the sum of \$177 is due and wholly unpaid.

The rules and regulations printed on the back of the order are also set out as a part of the complaint, but as these rules are long, and relate only to the rights and duties of exhibitors, and are wholly foreign to the contract sued on, it is unnecessary to set them out in this opinion.

A demurrer to the complaint was overruled, and appellants filed three paragraphs of special answer, to which the court sustained a demurrer, and this ruling constitutes the error relied on for reversal.

These paragraphs of answer allege that at the time of execution of the order sued on, there was an established and uniform custom of the business and trade in which said

transaction was had, that in the event the contractor for space could not, for any cause, attend such exhibition, and use and occupy the space subscribed for, that upon notification such space would be surrendered, and the cash payment retained by the manager of the exhibition in full settlement of all liability of the subscriber; that such custom was uniform, and well known to the parties, and was well understood by them at the time of the execution of the order.

It is also averred that on account of illness in the family of appellant Warner, it was impossible for appellants to arrange to attend the exhibition, and use the space subscribed for; that about September 21, 1908, appellants notified appellee that on account of such illness in the family of appellant Warner, appellants would not be able to attend such exhibition and occupy the space subscribed for, and duly surrendered all claim to the same; that appellee "met such surrender by assuring the defendants that plaintiff would do its best to sell said space, stating that no man could do better than his best, and claiming that if it could not sell said space, it would hold defendants for the payment therefor." Appellants replied to appellee, that they would lose what they had already paid, but would not pay for space which they would not use.

The points urged by appellants are (1) that the contract sued on is unilateral, and the complaint does not show an enforceable obligation; and (2) that the usage set up in the answers became a part of the contract, and proof of the same would defeat a recovery in this case.

A unilateral contract is a legal solecism. There is no such thing as a one-sided contract. The term, however, has found

a place in the books, as expressing the idea of a con-

1. tract lacking in mutuality. The order sued on in this action was primarily unilateral, but on acceptance by appellee it became binding on the parties,
2. and, on performance, either might enforce it. It is a rule so well settled as to be almost elemental, that

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where a contract or order is signed by one of the contracting parties, and accepted by the other, and affirmative acts constituting the consideration done by the latter, the party signing cannot assert a want of mutuality in the instrument. *Street v. Chapman* (1867), 29 Ind. 142, 152; *Fairbanks v. Meyers* (1884), 98 Ind. 92, 97; *Chicago, etc., R. Co. v. Derkes* (1885), 103 Ind. 520, 523, 3 N. E. 239; *Brown v. Russell & Co.* (1886), 105 Ind. 46, 53, 4 N. E. 428; *American Quarries Co. v. Lay* (1906), 37 Ind. App. 386, 390, 73 N. E. 608.

Appellants seem to rely on their answers setting up a custom of the business in which the transaction was had, as a bar to appellee's right to recover. A custom or usage long continued and uniform, generally known and ac-

3. quiesced in, may be shown in a proper case, where there is doubt in construing a contract or in ascertaining the manner of discharging some duty. *Morningstar v. Cunningham* (1887), 110 Ind. 328, 333, 335, 11 N. E. 593, 59 Am. Rep. 211; *Rastetter v. Reynolds* (1903), 160 Ind. 133, 136, 66 N. E. 612; *Leiter v. Emmons* (1898), 20 Ind. App. 22, 25, 50 N. E. 40; *Louisville-Cincinnati Packet Co. v. Rogers* (1898), 20 Ind. App. 549, 599, 49 N. E. 970; *Everitt v. Indiana Paper Co.* (1900), 25 Ind. App. 287, 290, 57 N. E. 281.

But the custom relied on must pertain exclusively to matters of fact, and not to matters of law, or supposed applications of the law. A custom cannot contradict the

4. plain and unambiguous terms of a contract or control its legal effect. It follows, therefore, that proof of a custom will not be received when in conflict with well-settled rules of law. *Cox v. O'Riley* (1853), 4 Ind. 368, 373, 58 Am. Dec. 633; *Atkinson v. Allen* (1868), 29 Ind. 375, 377; *Rafert v. Scroggins* (1872), 40 Ind. 195, 196; *Sohn v. Jervis* (1885), 101 Ind. 578, 581; *Bauer v. Samson Lodge, etc.* (1885), 102 Ind. 262, 271, 1 N. E. 571; *Morningstar v. Cunningham, supra*; *Scott v. Hartley* (1891), 126 Ind. 239, 247, 25 N. E. 826; *Brown v. Foster* (1873), 113 Mass. 136,

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18 Am. Rep. 463; *Hopper v. Sage* (1889), 112 N. Y. 530, 20 N. E. 350, 8 Am. St. 771.

The order and contract sued on in this action is not indefinite or ambiguous. It is a direct and positive promise to pay an amount certain at a time certain, without conditions or qualifications. The final payment was to be made at a time antedating the order, and the whole amount was therefore due on the execution of the same. Parties have a right to contract against custom, and where the contract is not open to construction or explanation, proof of a custom nullifying it will not be received.

The judgment is affirmed.

NOTE.—Reported in 98 N. E. 442. See, also, under (1) 9 Cyc. 244; (2) 9 Cyc. 327; (3) 12 Cyc. 1081; (4) 12 Cyc. 1053; (5) 12 Cyc. 1091. As to mutuality of contracts, see 53 Am. Dec. 373. As to the admissibility of evidence of a usage at variance with the express terms of a contract, see 18 Am. Rep. 205. As to the admissibility of evidence of custom to create an exception to written contract, see 3 L. R. A. (N. S.) 248.

COOPER v. HASELTINE ET AL.

[No. 7,563. Filed May 15, 1912.]

1. HUSBAND AND WIFE.—*Purchases by Wife.—Liability of Husband.*—The liability of the husband at common law on contracts made by the wife for articles suitable to her station in life, rests on the principle of the wife's agency. p. 406.
2. HUSBAND AND WIFE.—*Purchases by Wife.—Liability of Husband.—Agency.—Question of Fact.*—Where goods purchased by a wife are the bare necessities of life, the husband's liability therefor is absolute, but for other articles it is a question of fact whether, under all the circumstances, there was an authority, express or implied, for the wife to purchase the articles as her husband's agent, or, if purchased without authority, whether he subsequently ratified the same. p. 406.
3. HUSBAND AND WIFE.—*Purchases by Wife.—Agency.—Cohabitation.*—Cohabitation furnishes merely a strong presumption of the wife's authority to make purchases as the agent of her husband. p. 407.

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4. **HUSBAND AND WIFE.—*Purchases by Wife.—Ratification.***—The husband's ratification of an unauthorized purchase made by the wife may be shown by the fact that the wife, in the husband's presence, wears the articles purchased and he does not object. p. 407.
5. **HUSBAND AND WIFE.—*Purchases by Wife.—Agency.—Ratification.—Sufficiency of the Evidence.***—In an action for the price of jewelry purchased by defendant's wife, evidence showing cohabitation at the time of the purchase, that the defendant had promised to purchase jewelry for his wife, and had told her that his credit was good and to get anything she wanted, that when informed by plaintiff of his wife's purchase defendant said that it was all right, but not to sell her any more, and that the wife wore the articles in defendant's presence many times without objection, was sufficient to show either previous authority to the wife to make the purchase, or defendant's subsequent ratification thereof. p. 407.
6. **HUSBAND AND WIFE.—*Purchases by Wife.—Necessities.—Question of Fact.***—In an action to recover from the husband for the price of goods purchased by the wife, it is a question of fact as to what are the means and station in life of defendant and his wife, and as to whether the goods purchased are suitable to such means and station, so as to be classed as necessities for which the husband is liable. p. 407.
7. **HUSBAND AND WIFE.—*Action for Price of Goods Purchased by Wife.—Necessities.—Complaint.—Sufficiency.***—In an action for the price of jewelry sold to defendant's wife, a paragraph of complaint alleging that at the time of the purchase the defendant was wealthy and worth \$200,000 or more, and that to enable his wife to appear properly in the society of those with whom she associated it was necessary for her to have and purchase a diamond stud, brooch, watch and other jewelry of the value of \$246, which she purchased of the plaintiff, was sufficient to charge defendant with liability for the amount of the purchase, since, under modern conditions, such articles are suitable to the station in life of a woman whose husband is of the financial and social standing of defendant. p. 408.
8. **HUSBAND AND WIFE.—*Action for Price of Goods Purchased by Wife.—Liability of Husband.—Complaint.—Averment as to Agency.***—A complaint alleging that defendant's wife purchased on his credit and in his name articles necessary to, and in keeping with, her means and station in life, was sufficient without an averment that the purchase was made by her as the agent of her husband, as there is a legal presumption of such agency. p. 409.

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9. HUSBAND AND WIFE.—*Action for Price of Goods Purchased by Wife.—Complaint.—Sufficiency.*—A complaint for the price of goods sold to defendant's wife need not deny that the wife has otherwise been supplied with articles of the character purchased, such fact being a matter of defense. p. 409.

10. HUSBAND AND WIFE.—*Action for Price of Goods Purchased by Wife.—Complaint.—Allegation as to Agency.*—An allegation, in a complaint for the price of goods sold to defendant's wife, that she was the purchaser for her husband, is a sufficient averment that she was his authorized agent in making such purchase. p. 409.

From Howard Circuit Court, *Lex J. Kirkpatrick*, Judge.

Action by William Haseltine and another against William Cooper. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Joseph C. Herron and John W. Kern, for appellant.

Bell & Purdum, for appellees.

IBACH, P. J.—This action was brought by appellees, a firm of jewelers doing business in the city of Kokomo, to recover from appellant the sum of \$275 for diamonds and other jewelry sold by them to his wife.

The errors properly presented and not waived are that the second and fifth paragraphs of complaint are insufficient to withstand demurrer for want of facts, that the decision of the court is not sustained by sufficient evidence, and that the decision is contrary to law.

The second paragraph of complaint alleges that during the month of December, 1905, plaintiffs sold and delivered to defendant certain goods, of the value of and for the price of \$246, to wit, one diamond stud \$150; one brooch \$1.50, one scarf-pin \$50, one watch \$38, one watch fob \$5, one food-pusher \$1.50, total \$246; that said goods were sold to said defendant by and through his wife, Jennie Cooper, she being the purchaser thereof for said defendant, and said goods, wares and merchandise being for her use and benefit as the wife of said defendant. Judgment for \$275 was demanded.

The fifth paragraph alleges that during the month of

December, 1905, plaintiffs were engaged in the retail jewelry business in the city of Kokomo; that is, they were retailing all sorts of jewelry, diamonds, watches, and in fact such goods as are usually kept by retail jewelers; that during the month of December, Jennie Cooper was the wife of defendant, and had been his wife for a long time prior thereto; that said defendant was then and there a person of great wealth, having as much as \$200,000 or more; that to enable his wife to appear in society, and dress in keeping with her station in life, and fashionably dress herself and properly appear with those with whom she associated, it was essential and necessary for her to have and purchase certain jewelry, wares and merchandise, and that as the wife of said defendant and on his credit and in his name, she, said Jennie Cooper, wife of defendant, did purchase of these plaintiffs, and they did during the month of December, 1905, sell and deliver to her, certain jewelry and wares, at and for the agreed price of \$246, and of the value of \$246, all of which fully appeared in a bill of particulars filed with said paragraph (said bill of particulars sets forth the same articles described in the second paragraph); that, as alleged, said jewelry and merchandise were articles of wearing apparel and ornaments for the wife of said defendant, and were wholly in keeping with her station in life; that said sum is past due and wholly unpaid, although payment thereof has often been demanded and refused. Judgment demanded as in second paragraph.

There is evidence, which appellee urges is sufficient to support the verdict, which tends to show the following facts: Doctor Cooper, appellant, who was sixty-five years old, and had practiced medicine thirty years in Kokomo, and who was worth by his own testimony from \$75,000 to \$100,000, and Mrs. Jennie Story, a widow twenty-seven years old, at the time employed as a milliner, were married in September, 1905. Mrs. Story had roomed in the doctor's house during the lifetime of his former wife, of whom she

was a close friend. Before the marriage the doctor gave to Mrs. Story, as a birthday present, \$100, and took her driving, and showed to her his farms, and told her he was worth from \$75,000 to \$100,000, and she could have anything she wanted after they were married. He purchased from appellees, and gave to Mrs. Story a diamond engagement ring, and promised at the time to buy her a larger and better one after marriage. He told her he would get her a watch after marriage. The bridal couple went to the Portland Exposition on a wedding journey. She was furnished after marriage with sufficient wearing apparel, but no diamonds, and the doctor refused to furnish her with more than a small amount of money, but told her his credit was good, and she could get anything she wanted. He paid bills for other purchases she had made on credit from other merchants. Appellees were an established firm of jewelers in Kokomo, knew the doctor and his daughters and his wife. The doctor's married daughters went in society where diamonds were ordinarily worn, and watches and diamonds were frequently worn by women moving in good society in Kokomo. The relatives and friends of appellant, and the women with whom he and his wife associated during their marriage, were accustomed to wear jewelry of the value and character of that purchased of appellees, and the doctor's daughters and the wives of professional and business men worth as much as appellant were accustomed to wear such jewelry, and he and his family always moved in good society. When Mrs. Cooper purchased the goods from appellees she told them that the doctor had sent her there to get them. When they sold the goods, appellees knew of no trouble between the doctor and his wife. She had the diamond stud reset into a ring for herself shortly after the purchase. The articles sold were of the value charged for them. She wore the watch and ring about the house and in the presence of her husband a great many times, and he made no objection. Shortly after the purchase was made the doctor told appel-

lees not to sell anything more to his wife on his credit, but on being told that they had already sold her a good bill, said that was all right, but not to sell her any more. About the last of December, some two or three weeks after the last purchase of the jewelry in suit, the doctor instituted divorce proceedings against his wife.

To some of this evidence there is contradiction. It is unquestioned that the doctor followed many practices of simple living, that he cared for and hitched up his own horses, that on returning from the wedding journey the bridal couple commenced housekeeping in the cottage which had been the doctor's residence in the lifetime of his former wife, keeping no servants, and appellant contends that the evidence does in no manner show that the articles purchased were such as are essential and necessary to the well-being of the wife of appellant, and in nowise shows a legal liability on the part of appellant for the articles purchased.

The questions presented for decision are not entirely free from difficulty, and in some respects the authorities are in conflict, and in confusion. We shall be guided by what we believe to be the better rule as deduced from the cases, and that favored by the Indiana decisions. What we shall say in regard to the evidence will largely decide the points raised by the demurrers to the complaint. The question involved is one of agency primarily, but the ordinary principles of the law of agency are, in cases such as the present, complicated somewhat by the relationship of the parties between whom the relation of principal and agent is sought to be established, and by the character of the contract entered into by the wife.

In the case of *Litson v. Brown* (1866), 26 Ind. 489, 491, the Supreme Court said: "The husband is bound to support and maintain the wife, and to furnish her with necessities, and during cohabitation there is a presumption of law, arising from that fact, that the husband assents to contracts made by the wife for the supply of articles suitable

to their means and station in life. It is an implied agency, arising from the marriage relation, during cohabitation.” See, also, *Watts v. Moffett* (1895), 12 Ind. App. 399, 40 N. E. 533.

“The term ‘necessaries’ is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties. Ornaments and superfluities of dress, such as are usually worn by those in the parties’ rank and station in life, have been classed among necessities, and such we recognize the law to be.” *Clark v. Cox* (1875), 32 Mich. 204.

“The term ‘necessaries,’ in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.” *Bergh v. Warner* (1891), 47 Minn. 250, 50 N. W. 77, 28 Am. St. 362.

The liability of the husband at common law on contracts made by the wife for articles suitable to her station in life, rests on the principle of the wife’s agency. When

1. the goods purchased are the bare necessities essential to sustain life, it would seem that the husband is absolutely liable; for other articles, it is a question of fact whether, under all the circumstances, there was an authority, express or implied, for the wife to purchase the
2. articles as her husband’s agent, or whether if such purchase was made without authority, he subsequently ratified it. *Bergh v. Warner, supra*; *Jones v. Gutman & Co.* (1898), 88 Md. 355, 41 Atl. 792; *Wanamaker v. Weaver* (1903), 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. 621; *McBride v. Adams* (1903), 84 N. Y. Supp. 1060; *Ellenbogen v. Slocum* (1910), 121 N. Y. Supp. 1110, 66 Misc. 611; *Bennett v. Chamberlain* (1852), 5 Harr. (Del.)

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391; note to *Wanamaker v. Weaver* (1903), 65 L. R. A. 529, 536; Schouler, Husband and Wife §§106, 120.

Cohabitation furnishes merely a strong presumption of this agency. Note to *Wanamaker v. Weaver*, *supra*, 539.

The husband's subsequent ratification is as good as

3. previous authority. It has been held that this may be shown if the wife in the husband's presence wears the articles purchased, and he does not object. *Graham v.*

Schleimer (1899), 59 N. Y. Supp. 689, 28 Misc. 535;

4. *Ogden v. Prentice* (1860), 33 Barb. 160; *Manby v. Scott* (1659), Sid., pt. 1, p. 109; *Clark v. Cox*, *supra*; *Bennett v. Chamberlain*, *supra*.

In the present case, besides cohabitation, there appears abundant other evidence from which the court might infer the fact of authority. When appellant purchased

5. from appellees the diamond ring which he gave to Mrs. Story before their marriage, he remarked to her and to them that he would give her a larger one when they were married. She had lost her watch, and he told her he would get her another. He told her his credit was good, and to get anything she wanted. She told appellees when she purchased the goods in question that the doctor had authorized her to make the purchases, and when he later came into the store and told appellees to extend to her no further credit, and was told that they had already sold her a good bill, he said that was all right, but not to sell her any more. She wore the articles in his presence many times without objection. This evidence is amply sufficient to show either previous authority given by appellant, or subsequent ratification, or both.

Under the fifth paragraph of complaint, the question arises as to whether the articles purchased were suitable to the means and station in life of the wife. This also

6. must be considered as a question of fact, for the means and station of the parties cannot otherwise be

ascertained than as a fact. Some authorities hold that it is a question of law as to whether the character of the goods purchased is such as to constitute them necessities, and a question of fact as to whether the amounts purchased were necessary. The better reasoning, we believe, is that of the following cases, which hold that the entire question as to character and amount is one of relative fact, to be determined from the circumstances of each case. *Walling v. Hannig* (1889), 73 Tex. 580, 11 S. W. 547; *Shelton v. Hoadley* (1843), 15 Conn. 535; *Thorpe v. Shapleigh* (1877), 67 Me. 235; *Bergh v. Warner, supra*; *Bennett v. Chamberlain, supra*.

Under the Indiana rulings, we must hold it to be a question of fact as to what are the means and station in life of the parties, and as to whether the goods purchased are suitable to such means and station. The standard of living is so far advancing, and appellant admits that the standard has advanced in Kokomo, that we cannot restrict the meaning of the terms "necessaries," and "articles suitable to one's station in life," to such articles as they might have included some years ago. It is a matter of common

7. knowledge, of which not even courts can be ignorant, that persons of even much smaller means than appellant are accustomed to provide their wives with jewelry such as that which is the subject of this suit, and that such articles can certainly be said, under modern conditions, to be suitable to the station in life of persons of the financial and social standing of appellant. We regard the allegations of the fifth paragraph as sufficient to show that the articles sold were in keeping with the means and station in life of the party sought to be charged. The evidence is also such that the trial court would have been justified in finding for appellees under the fifth paragraph of complaint.

Since it is averred that Mrs. Cooper as the wife of defendant purchased on his credit and in his name articles necessary to and in keeping with, her means and station in life,

no further averment of agency is needed in the fifth
8. paragraph, for there is a legal presumption of the
agency of the wife to purchase such articles.

The husband may rebut this presumption by showing that
his wife has been supplied with articles of the character fur-
nished, but such is matter of defense, and need not
9. be negatived in the complaint. *Baker v. Carter*
(1890), 83 Me. 132, 21 Atl. 834, 23 Am. St. 764;
Clark v. Cox, supra; *Ellenborg v. Slocum, supra*; *Wana-*
maker v. Weaver, supra; Schouler, Husband and Wife §107.

The second paragraph of complaint is sufficient
10. against the objections urged, since the averment that
the wife was the purchaser for the husband can only
be construed to mean that she was his authorized agent.

No error appearing, the judgment is affirmed.

NOTE.—Reported in 98 N. E. 437. See, also, under (1) 21 Cyc. 1216, 1217; (2) 21 Cyc. 1234; (3) 21 Cyc. 1218; (4, 5) 21 Cyc. 1228; (6) 21 Cyc. 1220; (7) 21 Cyc. 1561; (8, 10) 21 Cyc. 1559, 1561; (9) 21 Cyc. 1561. As to the wife as the husband's agent, see 98 Am. St. 628. As to what are necessities for which a man must pay if bought by his wife, see 93 Am. St. 641. As to the husband's liability for necessities furnished wife while living with him, see 65 L. R. A. 529.

CARSON v. HANAWALT.

[No. 7,678. Filed May 16, 1912.]

1. CONVERSION.—*Complaint.—Allegations.—Sufficiency.*—A complaint for conversion directly alleging that plaintiff is the owner and was in possession of the chattels in question at the time of their conversion, is sufficient as to such allegations. p. 412.
2. CONVERSION.—*Complaint.—Allegation as to Damage.—Sufficiency.*—In a complaint for conversion, an allegation that the property converted was of the value of \$314.33, taken in connection with the allegations as to ownership, possession and conversion, was sufficient as an allegation showing damage in the amount of the value of the property. p. 412.
3. CONVERSION.—*Drain Tile.—Ownership.—Complaint.—Allegation of Specific Facts.*—Where a complaint for the conversion of drain tile alleged facts showing that such tile were a portion of

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a tile ditch constructed by the board of county commissioners for the drainage of plaintiff's land and other lands assessed to pay for its construction, that defendant, having a contract to construct a new drainage ditch along the line of the old one, entered on plaintiff's land and took therefrom the tile from the old ditch, against plaintiff's protest, and converted them to his own use, and that defendant had no title or interest in the tile whatever, such allegations showed plaintiff to have a positive interest in the property converted, and while it may have been special or qualified, it was such an interest as could be destroyed by the wrongful act of defendant, and sufficient to sustain an allegation of ownership. p. 412.

4. PLEADING.—*Complaint.—Demurrer.—Admissions.*—For the purposes of a demurrer, the allegations of the complaint must be taken as true. p. 413.
5. CONVERSION.—*Ownership of Property Converted.—Tenants in Common.—Right to Maintain Action.*—In a complaint for the conversion of drain tile, where it was shown that at the time of the conversion plaintiff was in possession of the tile and had an interest therein, it was of no consequence whether her interest was that of complete ownership, or that of a tenant in common with other land owners whose lands had been assessed for the payment of the ditch from which the tile had been taken, for in either event defendant's wrongful appropriation thereof to his own use entitled the plaintiff to maintain the action. p. 413.
6. CONVERSION.—*Ownership of Property.—Defense.*—The fact that property belonged to plaintiff and others cannot be used by a stranger as a defense in an action against him for conversion. p. 413.
7. CONVERSION.—*Actions.—Ownership.—Possession.*—The plaintiff in an action for conversion must have a right of property, either general or special, and possession, or the right of immediate possession at the time of conversion. p. 414.
8. CONVERSION.—*Action by Tenant in Common.—Damages.*—In an action for conversion, a plaintiff who is the owner as a tenant in common, is entitled to damages, as against a stranger, in the full value of the property converted, holding the surplus in excess of his interest as a trustee for the other owners. p. 414.

From White Circuit Court; *James P. Wason*, Judge.

Action by Wilda M. Carson against Milton Joseph Hanawalt. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Truman F. Palmer and *Benjamin F. Carr*, for appellant.
Spencer & Hamelle and *Clarence Conger*, for appellee.

MYERS, J.—On November 22, 1909, appellant commenced this action against appellee, charging the latter with the conversion of certain drain tile.

A demurrer for want of facts was sustained to the complaint, and appellant refusing to plead further, judgment was rendered against her, and in favor of appellee. The sufficiency of the complaint to withstand the demurrer is the question presented.

From the complaint it appears, among other things, that appellant was for many years the owner and in possession of certain described real estate in White county, Indiana, and on which, for several years, there existed a tile ditch, regularly established and constructed by the board of commissioners of said county under the drainage law then in force, for the purpose of draining said land and other lands assessed to pay for its construction. In the year 1909, said board of commissioners, pursuant to the drainage law in force April 10, 1907, established and ordered constructed over appellant's said land, and along the line of the afore-said tile ditch, a new ditch, for the construction of which the contract was awarded to appellee; that appellee, in the performance of said contract, entered on the land of appellant, excavated and removed the soil and tile along the line of the old ditch to the land of appellant bordering on the new ditch, where the tile remained for several days, as a part of such excavation; that while the tile so remained, appellant informed appellee that she was the owner of them, that they were in her possession, and forbid him removing them from her land, but appellee, disregarding appellant's warning, without any right or title thereto, removed said tile from her said land, and out of her possession, and wrongfully converted them to his own use; that the old tile were not taken into account by the drainage commissioners, nor mentioned in the plans and specifications for the new ditch, neither were they considered in the contract with appellee, nor used in the new construction; that appellant was the

owner of and entitled to the possession of said tile, which were of the value of \$314.33 at the time of their conversion by appellee. Appellant's demand on appellee for a return of the tile, and possession of the same, was refused, and her title to, interest in and right of possession denied.

This action is for conversion—trover at common law—and as the complaint directly alleges that appellant is the owner and was in possession of the chattels in question at

1. the time of their conversion by appellee, in this respect it states a cause of action. *Swope v. Paul* (1892), 4 Ind. App. 463, 31 N. E. 42; *Easter v. Fleming* (1881), 78 Ind. 116; *Day v. Watts* (1884), 92 Ind. 442.

The additional allegation showing that appellant was

2. damaged by the alleged conversion is not as perfect as good pleading would seem to require, yet it does appear that the property converted was of the value of \$314.33. This allegation, in connection with the allegations of ownership, possession and conversion, has been held sufficient as an allegation showing damage in the amount of the value of the property. *Ryan v. Hurley* (1889), 119 Ind. 115,

- 21 N. E. 463. Therefore the complaint in this case
3. must be held sufficient, unless it can be said that the specific facts alleged overcome the general allegations to which we have referred. If the specific facts as to ownership are influential, and their full import be conceded, and they be construed most strongly against the pleader, still appellant is shown to have a positive interest, and while it may have been special or qualified, yet it was such an interest in the tile as could be destroyed by the wrongful act of appellee, and sufficient to sustain an allegation of ownership. *Day v. Watts, supra*.

In this case the tile in question were originally paid for out of the fund derived from assessments levied on the land of appellant, and other lands benefited by the improvement then made. The construction of the new ditch, under the facts disclosed, must be regarded as an abandonment of the

old one, and whatever may have been the character of the tile, whether real estate or personal property, while in the ground, it is certain that after they were taken out of the old ditch they were personal property. In this connection we may say, there are no facts which will serve to give appellee any title or interest in the tile whatever. His contract provided that he should construct a ditch located along the line of the one from which the tile in question were removed, according to certain plans and specifications, for a specified sum of money. Such are the allegations

4. of the complaint, and for the purposes of the demurrer they must be taken as true. As to appellant, she had an interest in the tile, and whether that interest extended to complete ownership, or as a tenant in common

with the other landowners whose lands had been assessed to pay for the same, is not important, for the reason that the tile, in or out of the ditch, were on her land, and in her possession as fully as the excavated soil left there from the new construction. If she were the owner of the tile as alleged, and such tile being in her possession, the wrongful appropriation and conversion by appellee to his own use of such tile would amount to actionable conversion, or if appellant were the owner of the tile as a tenant in common, her interest would be destroyed by the alleged tortious acts of appellee, and she would be entitled to maintain

6. this action. The fact that the tile belonged to appellant and others could not be used by a stranger as a defense in an action against him for conversion. *Collins v. Ayers* (1877), 57 Ind. 239.

Our attention has been called to the case of *Louisville, etc., R. Co. v. Hart* (1889), 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549, as supporting the proposition that if the property converted was owned by tenants in common, an action by one of the tenants for conversion would not lie. That case is distinguishable from this case in that the gist of that action was negligence, while in this case negligence, active

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or passive, is not an essential element, for the essence of conversion is the wrongful deprivation of personal property to the owner. In actions of this character the rule in

7. this State requires the claimant to have a right of property, either general or special, and possession, or the right of immediate possession at the time of conversion. *Redman v. Gould* (1845), 7 Blackf. 361; *Swope v. Paul*, *supra*.

In this case appellant was in possession of the chattels, and having a general or special interest in them, her damages as against her coöwners would be the value of

8. her interest only, but as against a stranger she will be entitled to their full value, holding the surplus in excess of her interest as a trustee for other owners. *Jellett v. St. Paul, etc., Ry. Co.* (1883), 30 Minn. 265, 15 N. W. 237.

The case of *Smittle v. Haag* (1908), 140 Iowa 492, 118 N. W. 869, on account of a code provision of that state (Acts of Iowa 1904 p. 68, §26), and its particular facts, is not an authority in this case.

Judgment reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 98 N. E. 448. See, also, under (1) 38 Cyc. 2068; (2) 38 Cyc. 2071; (3) 38 Cyc. 2048, 2068; (4) 31 Cyc. 333; (5) 38 Cyc. 2052; (6) 38 Cyc. 2062; (7) 38 Cyc. 2044; (8) 38 Cyc. 2089.

LECHNER v. STRAUSS ET AL.

[No. 7,614. Filed May 17, 1912.]

1. PLEADING.—*Answer in Abatement*.—*Requisites*.—An answer in abatement should be pleaded without any repugnancy and should be certain to every intent, so that there is nothing to be supplied by intendment or construction and no supposable special answer left unobviated. p. 420.
2. PLEADING.—*Action Prematurely Brought*.—*Answer in Abatement*.—*Sufficiency*.—In an action to recover a balance due on a

contract for the sale of real estate and on a duebill given by the purchaser, where the complaint averred plaintiff's full performance of the terms of the contract and duebill, his execution of a deed to the land and its acceptance by the purchaser, and the contract sued on showed that plaintiff was required to furnish an abstract showing a merchantable title in fee simple to the approval of the purchaser and to execute and deliver a deed in escrow to be surrendered to the purchaser upon performance on his part, and the duebill recited that it was given for the balance due under the contract and would become payable on or after a designated future date on the furnishing of an abstract of title to the approval of the purchaser, an answer in abatement of the action as having been prematurely brought, which did not aver as a fact that plaintiff did or did not furnish an abstract of title, or, if furnished, that it was defective and that it was not approved, was insufficient both in law and in equity to show that the collection of plaintiff's claim should be delayed. pp. 421, 425.

3. **VENDOR AND PURCHASER.—Contracts.—Waiver of Modification of Prior Contract.**—Where the time of payment as fixed in a contract for the sale of real estate is, by the terms of a duebill given for the unpaid portion of the purchase price, postponed until the delivery by the vendor of an abstract showing a merchantable title to the approval of purchaser's attorneys such provision may be waived by the purchaser. p. 422.
4. **VENDOR AND PURCHASER.—Contracts.—Construction.**—A contract for the sale of real estate on specified terms and a duebill given for the unpaid portion of the purchase price, reciting that it is due on or after a certain date on the furnishing of an abstract of title to the approval of the purchaser, must be construed as an entirety, and, if susceptible of two constructions, a fair and equitable construction will be adopted rather than one which would result in injustice. p. 424.
5. **CONTRACTS.—Construction.**—Where a contract is fairly open to two constructions, one favorable to the party in whose interest it was prepared, and one favorable to the other contracting party, the construction favorable to the latter will be adopted if consistent with the object for which the instrument was prepared. p. 425.

From Allen Circuit Court; *Edward O'Rourke*, Judge.

Action by George W. Lechner against Simon J. Strauss and another. From a judgment for defendants, the plaintiff appeals. *Reversed*.

Eichhorn & Vaughn, for appellant.

Biggs, Barrett & Morris, for appellees.

HOTTEL, J.—Appellant brought this action to recover a balance due on a contract for the sale of real estate and on a duebill. Appellees appeared specially and filed an answer in abatement in two paragraphs, a demurrer to each of which was filed and overruled. A denial to each paragraph of said plea closed the issues, and a trial by the court resulted in a judgment for appellees.

The ruling of the court on the demurrers to each of the paragraphs of the plea in abatement presents the only question to be determined by this court. The complaint sets out the contract for the sale of the real estate and the duebill. The substance of that part of the contract and duebill necessary to an understanding of the questions presented is as follows: Appellant in consideration of \$1.00 and the covenants and agreements of appellees set out, grant unto appellees the option to purchase at any time on or before the 1st day of November, 1907, for the sum of \$6,000.00 on the terms and conditions hereinafter set out, the real estate described in Allen County, Indiana. In case of acceptance of such option, appellant was to convey by deed of general warranty to Abe Ackerman, of said county (one of the appellees) or to such other grantee as appellees might direct, a merchantable title in fee simple to said premises free of all incumbrances except as stipulated; such deed to be executed and delivered by appellant within ten days after the acceptance of the option to Old National Bank of Fort Wayne, to be by it held in escrow until appellees performed their part of the contract, whereupon such custodian was to surrender it to appellees; appellant to procure and deliver to appellees at Commercial Bank, in said city of Fort Wayne, an abstract of title to said premises showing title as aforesaid, all to the approval of appellees, the same to be submitted for examination within thirty days from appellees' acceptance, of the option contract, appellant to cause all defects therein to be corrected within sixty days thereafter, and if not corrected by that time, the appellees were author-

ized at their option to cause the same to be corrected, in which event appellant was to pay the expenses thereof. In consideration for which appellees agreed that should they avail themselves of this option, they would pay for said real estate said sum of \$6,000 as follows: “\$1,000 on or before the 1st day of November, 1907, * * * and the balance of \$5,000 * * * on or before the 1st day of January, 1908, * * * at the office of said Strauss Brothers & Company, Fort Wayne,” or at the office of said custodian at the option of appellees, providing that if appellant shall not have complied with his part of this contract, by said time, then appellees may at their option, withhold such payments until the same has been done. At the time of such final payments, appellant shall execute to the appellees an affidavit for further assurance as to title, in accordance with this contract. In the event of the default of appellant in the performance of this contract, the said custodian shall hold all of said purchase money that may thereafter be paid by appellees as indemnity, to secure the performance of this contract by appellant, until the same is complied with. Time is the essence of this contract and shall be so construed.

“DUEBILL.

Ligonier, Indiana, December 30th, 1907.

* * * There will be due from the undersigned Strauss Brothers & Company, to George W. Lechner, the sum of * * * (\$5,000.00) * * *, as the balance of the purchase price for the real estate conveyed by Warranty Deed dated the 30th day of December, 1907, * * * pursuant to contract by and between said grantor and his then wife, who has since died, and the undersigned, dated the 16th day of March, 1907. Said sum is to become due and payable * * * on or after the first day of May, 1908, * * * and when the said grantors shall have delivered to the undersigned an abstract of title to said premises showing merchantable title thereto free of liens, all to the approval of the attorneys for the undersigned and all in

accordance with the provision of said contract which is referred to herein and made a part hereof. The undersigned reserve the right to cause all of the conditions of this due bill to be complied with and they are hereby authorized to pay the abstractors and attorneys for their services and expenses incurred on account thereof whether contracted for by the said payee or by the undersigned. All disbursements as provided for herein which shall be made by the undersigned are to be deducted from the amount of this duebill. That portion of said sum, if any, in excess of Two Hundred (\$200) dollars, shall bear interest at the rate of 5 per cent per annum from the first day of March, 1908, until the aforesaid conditions of this duebill are complied with, provided, however, that such interest shall cease in any event at the expiration of one year. The residue of said sum shall not bear any interest. * * *

By Simon J. Strauss,
a member of said firm."

This duebill shows a number of indorsements of payments of various sums, the last of which bears date October 24, 1908, when \$262.18 was paid thereon.

Appellant in his amended complaint avers that he had "fully performed and complied with the terms of said contract and duebill in the matters therein set forth; that he executed the deed of conveyance for said real estate to the defendants which deed was accepted by said defendants and that said defendants have since sold and conveyed said property * * * that there is due plaintiff under said contract and duebill the sum of \$1,206.46."

The first paragraph of the plea in abatement, after averring that defendants appear specially to the amended complaint, alleges, in substance, that appellant ought not to maintain his action, because, he executed the "option contract," which is also filed as an exhibit with said plea; that pursuant to said option appellees purchased said real estate from appellant, and that he conveyed the same to Abe Ackerman; that (we quote) "on the duebill herein sued upon there is to be paid plaintiff * * * (\$1,266.92) but de-

defendants aver that said amount is not due nor payable nor was the same due or payable at the commencement of this action because they say, that in and by the terms of said contract plaintiff agreed to deliver defendants an abstract of title to the above real estate, compiled by competent and responsible abstractors, showing a merchantable title therein in plaintiff, free of all liens, such abstract to be approved by defendants' attorneys and defendants aver that plaintiff did not comply with *his contract* in this, that *the same* was not approved either by the defendants or their attorneys because as shown by the abstract delivered by plaintiff to defendants," certain suits were filed against appellant, which, it is averred, affected the title to said real estate, viz., a suit by Thomas Greer, the administrator of appellant's grantor; against appellant for an amount alleged to be due on purchase-money notes given for said land, and to foreclose a vendor's lien thereon. The compromise and settlement of said suit is alleged, also the filing of other suits against appellant, all of which it is alleged were dismissed except one, and as to this, it is averred that judgment was rendered for appellant.

Then the following averments are given: "That because of the institution of said action by said Thomas Greer, administrator, the manner of the settlement thereof and the other suits brought affecting said real estate *defendants' attorney insisted that in order to cure any defects in the conveyance by said Patrick Malloy, to plaintiff* and by reason of similar claims, which might be asserted by the heirs of said Patrick Malloy, deceased, who were unknown, it would be necessary to bring action against all such heirs of said Patrick Malloy, whose names and residences were unknown, and thereupon plaintiff employed his attorney, Charles Kuhne, to bring action in the name of Thomas P. Stack, grantee of said Abe Ackerman, * * * against all the heirs, unknown spouses, * * * and all parties appearing of record who might have any claim against said

real estate, and, with said complaint, plaintiff filed his affidavit that the residences of each and all of said defendants to said action upon diligent inquiry were unknown, and * * * a decree was entered quieting the title in and to said premises in said Thomas P. Stack and *thereupon defendants and their attorneys objected to said abstract as not being merchantable and to the payment of said balance under said duebill until the expiration of five years from the date of said decree, towit: September 17, 1908, and for the cause of objection state and now allege that under the laws of Indiana any of the defendants to said action upon a proper showing would have the right to open up said decree within said time and further notifying plaintiff that they would pay the balance due on said duebill at the expiration of said time. Defendants further aver that they notified plaintiff that said abstract was not merchantable in that, the same on its face showed that claims were asserted and made by heirs and others interested in the estate of said Patrick Malloy, deceased, that at the time of said conveyance he was of unsound mind and that until twenty years had expired from the date of his death and the issuance of said letters of administration, as aforesaid, said title would be open to attack by the heirs of said Patrick Malloy, deceased, who were then unknown; that by reason of the premises said duebill was not payable at the commencement of this action, and will not be due or payable until five years from September 17th, 1908, by reason of the matters and things hereinbefore set forth."*

In determining the sufficiency of an answer in abatement, the rule governing the same is different from that which ordinarily obtains in determining the sufficiency of a

1. pleading. The Supreme Court in the case of *Needham v. Wright* (1895), 140 Ind. 190, 194, 39 N. E. 510, quotes from 1 Chitty, Pl. 462, the following language: " 'As pleas in abatement do not deny, and yet tend to delay the trial of the merits of the action, great accuracy and

precision are required in framing them. They should be certain to every intent, and be pleaded without any repugnancy.' In Stephen Pl. 352 (9th Am. ed.), it is said that dilatory pleas 'are regarded unfavorably by the courts, as having the effect of excluding the truth;' and therefore that they 'must be certain in every particular; which seems to amount to this, that they must meet and remove by anticipation every possible answer of the adversary.' * * * In Gould Pl. §§52, 57, 58, 59, in speaking of the certainty required in pleas in abatement and other dilatory pleas, the rule is stated even more strongly: 'Certainty of this sort, or "to a certain intent in *every particular*," requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving, on the one hand, nothing to be supplied by intendment or construction; and on the other, no supposable special answer unobviated. The rule requiring this degree of certainty, is a rule not of "*construction*" only, but also of "*addition*"; that is, it requires the pleader, not only to answer fully what is necessary to be *answered*; but also to *anticipate* and exclude all such supposable matter, as would, if alleged on the opposite side, *defeat* his plea.' The rule as thus given by the textwriters is followed in this state. *Board, etc., v. Lafayette, etc., R. Co.* [1875], 50 Ind. 85 (117); *Kelley v. State* [1876], 53 Ind. 311 (312). See, also, 1 Am. and Eng. Ency. Law 11, and notes."

It will be observed from the language of the answer quoted that it is nowhere alleged as a fact that appellant did or did not furnish an abstract. It is nowhere alleged

2. as a fact that appellees, either in person or by their attorneys, refused to approve, or whether or not any abstract was in fact submitted for the approval or disapproval of either appellees or their attorneys. It is nowhere alleged as a fact that the abstract furnished was defective or not merchantable. It is only alleged that plaintiff did not comply with *his contract* in this, that *the same* (necessarily

referring to contract) was not approved either by the defendants or their attorneys, because, etc., and then follows an enumeration of certain suits which the recital above would indicate was shown by the abstract. True, after the recital of the facts connected with the various suits filed, and their disposition, and after averring that on account of such suits the appellees' attorney "*insisted that in order to cure any defects in the conveyance by said Patrick Malloy,*" it would be necessary to bring action against all such heirs, and after averring that pursuant to this request the appellant employed his attorney to bring such suit in the name of appellees' grantee, Thomas P. Stack, and by such suit obtained a judgment therein quieting the title in and to said premises in said Stack, it is then averred that thereupon appellants "*and their attorneys objected to said abstract as not being merchantable, and to the payment of said balance.*"

Tested by the rule governing pleadings generally, this paragraph of answer would be open to criticism, to say the least, in that some of its essential averments are uncertain, and are made by way of recital and conclusion, and when tested by the rules above announced governing pleas of this character, it is fatally defective, in that it is not "*certain to every intent,*" and falls far short of containing "*the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving, on the one hand nothing to be supplied by intendment or construction, and on the other no supposable special answer unobviated.*"

Giving appellees the benefit of the construction which they insist must be given to the duebill, viz., that it expressly postpones the time of its payment until the delivery

3. by appellant of an abstract showing a merchantable title in said real estate, all to the approval of appellees' attorneys, yet this condition, the same as any other, might have been waived by appellees.

The complaint to which this answer is addressed avers

performance of all the terms of the contract and duebill, and that appellant had executed the deed to the real estate in question, which deed "*was accepted*" by the appellees, and that they "*have since sold and conveyed the property.*" The option contract provided that the deed should be placed in a bank in escrow within ten days after the acceptance of such contract by appellees, to be held until the terms of the contract were complied with by appellees. Appellees were to pay \$1,000 cash on or before November 1, 1907, and the remaining \$5,000 on or before January 1, 1908. Instead of paying in full on January 1, 1908, appellees gave the duebill sued on.

The option contract provided that in case of default on appellant's part in the performance of such contract, the custodian should hold all of such purchase money, thereafter paid by appellees, as indemnity to secure such performance. The duebill provided that appellees might withhold the payment of all of the \$5,000 until abstract was furnished. In view of said conditions in the option contract and the duebill, the acceptance by appellees of the deed and their conveyance of the real estate to another, and the payment by appellees of all of the \$5,000 except \$1,266.92, the averment in the answer that appellees' attorneys insisted that, *in order to cure any defects in the conveyance to appellant* from his grantor, a suit should be filed to quiet title, and that pursuant to this request appellant authorized his attorney to bring such suit in the name of appellees' grantee, the bringing of said suit and the quieting of title are each and all facts strongly suggestive, at least, of a waiver of said condition, postponing payment until abstract was furnished, and, under certain conditions, might be conclusive thereof.

It is nowhere averred in this answer when the abstract which appellees in person or by their attorneys refused to approve was furnished for examination under said option contract, whether before or after appellees' acceptance of the deed, and the conveyance of the land by appellees. or

whether before or after the payment of the various sums paid on the duebill. Nor is it, in fact, averred whether such abstract was furnished before or after the giving of the duebill itself.

Appellees apparently recognize that the equities of the case are against their contention, but insist that equitable principles have no place in the case. This statement
4. is true when properly qualified. If the court were required to construe the contract of sale and the duebill on which this action is brought, which it would necessarily be required to do if the plea in abatement were in all other respects sufficient, they would be construed as an entirety; and if there were such ambiguity and uncertainty in their meaning as to make them susceptible of two constructions, well-established principles governing in such cases would require the adoption of a fair and equitable construction, rather than one which would result in injustice and inequity. *Cleveland, etc., R. Co. v. Moore* (1908), 170 Ind. 328, 340, 82 N. E. 52, 84 N. E. 540; *Dunning v. Elmore Hamilton Cont. Co.* (1910), 124 N. Y. Supp. 107, 111, 139 App. Div. 249; *Chicago, etc., R. Co. v. Provolt* (1908), 42 Colo. 103, 117, 93 Pac. 1126, 16 L. R. A. (N. S.) 587.

In this connection it may be stated further, that looking at all the provisions of this option contract and duebill, it is manifest that they were prepared by appellees or
5. their agents or attorneys, or, at least, that the dominant, if not the sole intent and idea of the person who prepared the same was to see that appellees' interests were fully protected. In such a case, where the writing is fairly and reasonably open to two constructions, one favorable to the party in whose interest it was prepared, and one favorable to the other contracting party, the courts will adopt that construction favorable to the latter party rather than that favorable to the first party, when such construction is consistent with the objects for which the instrument was prepared. *Wilson v. Cooper* (1899), 95 Fed. 625, 628; *Leslie*

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v. *Bell* (1904), 73 Ark. 338, 342, 84 S. W. 491; *First Nat. Bank v. Hartford Fire Ins. Co.* (1878), 95 U. S. 673, 24 L. Ed. 563; *Rankin v. Rankin* (1903), 111 Ill. App. 403, 409.

But for the reasons above suggested, the averments in the plea in abatement are not sufficient to show that either in law or equity the collection of plaintiff's claim, relied

2. upon in his complaint, should be delayed. What we have said in regard to the first paragraph of the plea, necessarily means that the second is also bad.

The judgment is therefore reversed, with instructions to the court below to sustain the demurrer to each of the paragraphs of the answer in abatement, and for such further proceedings as may be consistent with this opinion.

NOTE.—Reported in 98 N. E. 444. See, also, under (1, 2) 31 Cyc. 179; (3) 39 Cyc. 1292; (4) 39 Cyc. 1296; (5) 9 Cyc. 590. As to options to purchase land, also, as to time fixed for payment, see 104 Am. St. 271, 275. As to rule favoring the grantee of a deed in preference to the grantor, see 59 Am. Dec. 548.

CHICAGO AND ERIE RAILROAD COMPANY v. HAMERICK, ADMINISTRATOR.

[No. 6,980. Filed November 28, 1911. Rehearing denied May 17, 1912.]

1. PLEADING.—*Complaint.—Statutory Action.*—Where a pleader seeks to state a cause of action under the statute, facts must be averred which bring the case within the provisions of the statute. p. 433.
2. MASTER AND SERVANT.—*Railroads.—Negligence.—Complaint.—Allegations.—“Signal”.*—In an action against a railroad company for the death of an employe, an allegation of the complaint that the decedent was given “a signal calling him on down main track”, was not the statement of a conclusion, but such expression and others of similar import, when used in railroad business having to do with the operation of trains, are statements of fact. p. 433.
3. MASTER AND SERVANT.—*Railroads.—Negligence.—Complaint.—Sufficiency.*—In an action against a railroad company for the death of an employe, where the complaint averred that the decedent was an engineer in charge of one of defendant's trains

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and was approaching a station under orders to meet another train at that point, that he checked the speed of his engine preparatory to taking the siding when he received from the operator of defendant's block system a "signal calling him on down main track", which he answered by sounding his whistle and then proceeded down the main track to the front of the station where the collision occurred, resulting in his death, it was not insufficient as against a demurrer for failure to aver additional facts in regard to the alleged signal, but was open to a motion to make more specific. p. 434.

4. MASTER AND SERVANT.—*Railroads.—Negligence.—Complaint.—Allegations.—"Duty".*—In a complaint against a railroad company for the death of an engineer in charge of defendant's train, caused by a collision resulting from the failure of a block signal operator to give proper signals, the allegations "that it was the duty and business" of the operator to give proper signals, and that it was "the duty and business" of the decedent to obey the signals so given, were averments of ultimate facts and not mere conclusions of the pleader. p. 434.
5. PLEADING.—*Conclusions.—"Duty".*—Although the use of the word "duty" in a general statement charging that it is one's duty to do, or to refrain from doing, a certain act or thing, intending thereby to charge that by reason of contractual relations, or by implication of law, one is obligated to do or not to do the particular thing averred, would render such averment the statement of a conclusion, there are cases in which the word may be used in a pleading to designate the character of work to be done, or the act to be performed, in pursuance of an employment, and when so used the allegation is not a conclusion, but one of ultimate fact. p. 434.
6. MASTER AND SERVANT.—*Railroads.—Negligence.—Complaint.—Sufficiency.*—A complaint in an action for the death of a railroad engineer in a collision with a standing train at a station, which shows a fully equipped telegraph office and block signal system at the station with an employe in charge, whose business it was to give signals, and which alleged that plaintiff's decedent approached the station under orders to meet a train there, that he checked the speed of his engine preparatory to taking the siding, when he received from the operator a signal calling him to come down the main track, that it was the duty and business of such operator to give proper signals, and of the decedent to obey the same, that decedent proceeded down the main track and his train collided with a train standing at the station, thereby causing his death, sufficiently complied with §343 Burns 1908, §338 R. S. 1881, requiring the facts to be stated in plain and concise language, and stated a cause of action under the fourth clause of

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section one of the employers' liability act (§8017 Burns 1908, Acts 1893 p. 294). p. 435.

7. **APPEAL.—Review.—Verdict.—Answers to Interrogatories.**—A general verdict finds every issuable fact in favor of the prevailing party, and on appeal the court cannot, in passing on a motion for judgment on the answers to interrogatories, consider the evidence, but must look solely to the general verdict, the interrogatories and answers, and to the facts provable under the issues. p. 439.
8. **MASTER AND SERVANT.—Railroads.—Negligence.—Abrogation of Rules.—Evidence.**—In an action against a railroad company for the death of an engineer in a collision, where the complaint alleged that the decedent was under orders to take a siding and when preparing to take the siding he received a signal from defendant's operator to take the main track, and that it was the duty of the operator to give proper signals and of the decedent to obey same, evidence that, by long usage and custom a rule was established and acquiesced in by defendant and its employes, permitting an engineer to obey such signal notwithstanding the company's printed rules or previous orders to the contrary known to him, was admissible to show an abrogation of the printed rules. p. 440.
9. **MASTER AND SERVANT.—Railroads.—Negligence.—Verdict.—Answers to Interrogatories.**—In an action for the death of a railroad engineer in a collision, where the decedent had complied with a signal to proceed down the main track instead of complying with a previous order to take the siding, answers to interrogatories which showed that rules of the company known to the decedent required him to take the siding, were not in conflict with the general verdict, where, under the issues, evidence of a custom to obey such signals and of the abrogation of the rules was admissible. p. 440.
10. **APPEAL.—Review.—Verdict.—Sufficiency of the Evidence.**—The court will not weigh the evidence on appeal, and where there is evidence tending to prove all the facts essential to a recovery, the verdict will not be disturbed for insufficiency of the evidence. p. 440.
11. **MASTER AND SERVANT.—Railroads.—Regulation of Employment.—Duty to Adopt Rules.**—It is the duty of a railroad company to adopt and promulgate reasonable rules for the running of its trains and the safety of its employes. p. 441.
12. **MASTER AND SERVANT.—Railroads.—Duty of Employee to Obey Rules.—Contributory Negligence.**—Where they are brought to his notice, it is the duty of a railroad employee to obey the reasonable rules promulgated by the company for the safety of employes, and if he violates any such rule, and is injured as a proximate

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result thereof, he is guilty of contributory negligence and cannot recover, unless there are facts relieving him from the duty of strict obedience, or unless the rule has been abrogated. p. 441.

13. **MASTER AND SERVANT.—Injury to Servant.—Violation of Rules of Employment.—Abrogation of Rules.—Negligence.**—Where an employer knowingly permits his rules established to promote the safety of his employes to be habitually violated by them, such rules will be deemed to have been abrogated by his consent, and he will not be permitted to set up a violation of any such rule as contributory negligence to preclude a recovery for an injury to or the death of an employe. p. 441.

14. **APPEAL.—Review.—Verdict.—Sufficiency of Evidence.**—In passing on error assigned in overruling a motion for a new trial on the ground of insufficient evidence to sustain a verdict for plaintiff, in an action against a railroad company for the death of an engineer in a collision, where the evidence showed that the decedent violated the printed rules of the company in obeying a signal to proceed down the main track, instead of complying with a previous order to take the siding, the court, under the issue tendered by a complaint alleging that it was the duty of the decedent to obey such signal, must ascertain whether there was some evidence from which the jury may rightfully have found the existence of a custom to thus violate such printed rules so as to operate as an abrogation of the same. p. 444.

15. **APPEAL.—Review.—Verdict.—Sufficiency of Evidence Must be Determined from Record.**—Where error is assigned in overruling a motion for a new trial on the insufficiency of the evidence to sustain a verdict, the question whether there was evidence to warrant the jury's finding must be determined from the record alone, and the question of what evidence was admissible under the issues cannot be considered. p. 444.

16. **MASTER AND SERVANT.—Railroads.—Contributory Negligence.—Question for Jury.**—In an action for the death of a railroad engineer in a collision with a train standing at a station, where the decedent had proceeded down the main track with his train instead of complying with the printed rules of the company under an order to take the siding, and there was evidence to show that he proceeded down the main track in obedience to a signal given by the operator of defendant's block-signal system, and tending to show that it was the usual custom on defendant's road, when such signal was given a train approaching under orders to take the siding, not to go in on the switch, but to proceed on down the main track to the station for orders, and that such custom was known to and acquiesced in by defendant, it was for the jury to determine whether decedent was guilty of contributory negligence. pp. 445, 447.

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17. **NEGLIGENCE.—Contributory Negligence.—Question of Law.**—Where the evidence as to contributory negligence is undisputed, the question is one of law for the court. p. 446.
18. **TRIAL.—Evidence.—Inferences from Facts Proved.—Consideration by Jury.**—The jury has a right to consider all the evidence, and determine its weight as applied to any issuable fact in the case, and also to consider what may be reasonably inferred from what is thus proved. p. 447.
19. **NEGLIGENCE.—Contributory Negligence.—Conflicting Evidence.—Question for Jury.**—Where there is any conflict in the evidence given on a trial on the subject of contributory negligence, the decision of the issue should be submitted to the jury. p. 447.
20. **APPEAL.—Review.—Verdict.—Evidence.**—Where there was some evidence to warrant a jury in finding that there was no contributory negligence, a verdict for plaintiff will not be disturbed. p. 447.
21. **TRIAL.—Instructions.—Refusal.—Instructions Covering Those Refused.**—It is not error to refuse requested instructions where they are covered by the instructions given. p. 448.
22. **APPEAL.—Review.—Harmless Error.—Instructions.—Refusal.**—In an action for the death of a railroad engineer, where the complaint charged negligence in the giving of a signal by the operator of defendant's block system, the refusal of an instruction that if the alleged signal was given by order of the train dispatcher there could be no recovery was harmless where the jury's answer to an interrogatory showed that the signal was not given by order of the train dispatcher. p. 448.
23. **TRIAL.—Instructions.—Incomplete Instruction.—Failure to Tender Complete Instruction.—Waiver of Error.**—Error in giving an incomplete instruction, which states the law correctly as far as it goes, is waived by failure to tender a more complete instruction on the subject. p. 448.
24. **APPEAL.—Review.—Verdict.—Harmless Error.—Incomplete Instruction.**—The giving of an incomplete instruction on the measure of damages is harmless error where the size of the verdict was warranted by the facts shown. p. 449.
25. **APPEAL.—Review.—Harmless Error.**—Where it is apparent from the record that appellant was not harmed by the admission or the exclusion of certain evidence, questions presented thereon will not be considered. p. 449.

From Wells Circuit Court; *Charles E. Sturgis*, Judge.

Action by Davis P. Hamerick, as administrator of the estate of William E. McCalley, deceased, against the Chicago and Erie Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

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W. O. Johnson, Arthur H. Jones and Ulric Z. Wiley, for appellant.

C. W. Watkins and E. O. King, for appellee.

FELT, C. J.—Davis P. Hamerick, as administrator of the estate of William E. McCalley, deceased, brought this action against appellant to recover damages for the death of said decedent alleged to have been caused by the negligence of appellant.

Under the issues joined there was a trial by jury and a verdict for appellee in the sum of \$3,200. Judgment was rendered on the verdict, from which this appeal is prosecuted.

The errors relied on for reversal challenge the sufficiency of the facts averred in each of the first, second and third paragraphs of the amended complaint, also the overruling of appellant's motion for judgment on the answers to the interrogatories, notwithstanding the general verdict, and overruling the motion for a new trial.

Omitting the formal parts, the first paragraph of the amended complaint, in substance, avers that appellant owns and operates a line of railroad from the city of Chicago, in and through Huntington and Wabash counties, in the State of Indiana, to the city of Erie, in the State of Pennsylvania; that it owns a large number of locomotives, cars, trains, etc., which it operates on said road; that it maintains along its road, side-tracks, switches, stations, platforms, systems of signals and all usual and necessary equipment for the management and operation of such road; that on December 11, 1905, William E. McCalley, appellee's decedent, left Huntington, Indiana, as engineer on engine No. 776, going west, which was the head engine of an extra train running as a double-header; that when said train left Huntington the crew had meeting orders for trains No. 32 and No. 74, east bound, at Bippus, Indiana, the first station west of Huntington; that when said extra train came

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to the switch at Bippus, the operator at said station called engineer McCalley up main track, and a "Number nineteen train order" was handed on, changing the meeting order for No. 74 from Bippus to Servia, Indiana, which is on defendant's road, and at which place a telegraph operator is placed and provided with signals, blocks, lights, flags, and all things necessary to signal trains; that when said extra train No. 776 arrived at Servia, said McCalley brought his train nearly to a stop some distance east of the switch, and the head brakeman ran ahead to throw the switch, preparatory to heading in on to the siding; that before said brakeman came near the switch, the operator at Servia gave said McCalley a signal, calling him on down main track; that it was the duty and business of said operator, then and there in the employ of defendant, to give proper signals to employes managing and running trains for defendant on its road; that it was then and there the duty and business of said McCalley to obey the signals given him by said operator, and McCalley relied and had a right to rely on the same in running his train; that when said McCalley was called up main track he whistled his brakeman, who, seeing that his train was signaled up main track, stopped and waited for his train; that said McCalley, relying on the block issued to him by said operator, went on down main track, and when within a few rods of the station at Servia, through the darkness, and from the reflection of the headlight on his own engine, he saw train No. 74 standing in front of said depot on the main track; that said McCalley applied his air, reversed his engine, and whistled for brakes, and did everything possible to stop his train, but without success; that a collision occurred between said trains No. 776 and No. 74, and said McCalley was thrown under his engine and killed; that said operator was in the employ of defendant corporation and in charge of the block signals at the station of Servia, and negligently gave to said McCalley, as engineer, a signal calling him up main track, when train No. 74 already

had the right of way on the main track, and by reason of his negligence in so doing said engineer was killed, as aforesaid.

It is further averred that appellee is the duly appointed administrator of decedent's estate; that decedent left surviving him Allie M. McCalley, his widow, Alonzo V. and Frank McCalley, his children, aged respectively twenty and thirteen years, who were dependent upon him.

The second paragraph of amended complaint, contains substantially the same averments as the first paragraph, and, in addition thereto, alleges that it was about 5.45 o'clock p. m. when the accident occurred; that it was dark; that train No. 74 was standing on the main track in front of the station at Servia, and the headlight on engine No. 809, drawing said train No. 74, was not burning so as to be visible to the crew of said extra train; that the engineer on train No. 74 was in the service of appellant, and at the time acting in the line of his duty and in charge of the engine drawing said train; that as such engineer it was his duty to have the headlight on his engine burning so as to be visible as a signal to approaching trains; that said McCalley, as soon as he saw train No. 74, made every effort to stop his train, but without success; that by reason of the negligence of the engineer on said train No. 74 in failing to have his headlight burning so as to be visible to the employes on an approaching train, and by reason of said operator giving said McCalley the signal to come down the main track, the latter did proceed on down the main track with his train, which collided with train No. 74, causing his death, by and on account of the negligence aforesaid.

The third paragraph of the amended complaint combines the averments of the first and second paragraphs, and for the purposes of this appeal is the same as the latter.

The sufficiency of each paragraph of the complaint is questioned by demurrer and by independent assignment of error. It is urged that neither paragraph states a cause of action under the common law, and that the facts averred are

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insufficient to bring the complaint within any of the provisions of the employers' liability act; that it fails to show that appellant owed a legal duty to appellee's decedent which was negligently omitted or performed to his injury.

The objections urged are equally applicable to each paragraph of the complaint. Evidently the pleader has sought to state a cause of action under the statute. Where

1. this is done, facts must be averred which bring the case within the provisions of the statute relied on. *Chicago, etc., R. Co. v. Barnes* (1905), 164 Ind. 143, 148, 73 N. E. 91.

The specific objection urged against the complaint is that the allegations charging negligence are mere conclusions, and not the averment of facts. This objection is specially urged with great emphasis against the statement that "the operator at Servia gave said McCalley a signal calling him on down main track," also "that it was the duty and business of said operator * * * to give proper signals to employes," and that it was "the duty and business of said McCalley to obey the signals given him by said operator."

Doubtless the form of these averments could be improved, but to say that the engineer was given "a signal calling him on down main track" is not the statement of a con-

2. clusion, but of a fact. In railroad business having to do with the operation of trains, to say that a man is given "a signal to stop" or "a signal to back up" or to use other statements of similar import, is not to state a conclusion, but a fact.

Webster defines the word signal to mean "a sign, event or watchword which has been agreed upon as the occasion of concerted action. A sign made for the purpose of giving notice to a person of some occurrence, command or danger." Applying this definition to the business of operating railroad trains, it is apparent that the pleader in a case like this cannot go far in defining the alleged signal and its meaning,

without pleading evidence, which is as much condemned by the rules of good pleading as the statement of conclusions instead of facts.

The averments of the complaint show that appellee's decedent, in charge of appellant's engine No. 776, was approaching the station at Servia from the east, under

3. orders to meet another train at that point; that he checked the speed of his engine, and sent his brakeman to throw the switch, preparatory to taking the siding, when he received from the operator a signal, which he answered by sounding the whistle of his engine, and then proceeded down the main track to the front of the station where the collision occurred, resulting in his death. On motion to make the complaint more specific, the court doubtless would have required some additional averments as to the kind and character of the signal given, its meaning and application to the particular case, but as against the demurrer, the complaint is not insufficient for failure to aver additional facts in regard to the alleged signal.

Under the statute, the operator stood in the place of the master, and his acts in giving signals to regulate and control the movement of trains, were the acts of appellant.

4. Aided by the other averments of the complaint, the statements "that it was the duty and business" of the operator to give proper signals, and that it was "the duty and business" of the engineer to obey the signals so given, were averments of ultimate facts, and not mere conclusions of the pleader.

The complaint shows a fully-equipped telegraph office and signal station at Servia, on appellant's road, with an employe in charge, whose business it was to operate the same, and who gave the alleged signal of which appellee complains.

The words "duty and business," employed by the pleader, plainly refer to the work of the operator in charge

5. of the station, and likewise to the work and business of the engineer. There are instances where the

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word "duty" may be used in a pleading to designate the character of work to be done, or the act to be performed, in pursuance of an employment, and when so used the allegation is one of ultimate fact, and not subject to the criticism that it states only a conclusion of the pleader. There is, however, a clear distinction between such use of the word "duty," and its use in a general statement charging that it is the duty of a person to do, or to refrain from doing, a certain act or thing, intending thereby to charge that by reason of contractual relations, or by implication of law, such person is obligated to do or not to do the particular thing averred.

In the latter case the weight of authority is decidedly to the effect that such averments state conclusions of law, and not facts. But the use of the word duty in the case at bar, clearly comes within the former class, and is employed in the sense of work or labor. This view is strengthened by the fact that it is used in connection with the word "business." *Pittsburgh, etc., R. Co. v. Lightheiser* (1904), 163 Ind. 247, 254, 71 N. E. 218, 71 N. E. 660; *Cleveland, etc., R. Co. v. Morrey* (1909), 172 Ind. 513, 520, 88 N. E. 932; *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, 315, 76 N. E. 1060; *Chicago, etc., R. Co. v. Barker* (1908), 169 Ind. 670, 675, 83 N. E. 369, 17 L. R. A. (N. S.) 542; *Princeton Coal, etc., Co. v. Roll* (1904), 162 Ind. 115, 119, 66 N. E. 169; *Chicago, etc., R. Co. v. McDaniel* (1893), 134 Ind. 166, 172, 32 N. E. 728, 33 N. E. 769; *Hay v. Bash* (1906), 37 Ind. App. 167, 172, 76 N. E. 744; *Chicago, etc., R. Co. v. Hamilton* (1908), 42 Ind. App. 512, 517, 85 N. E. 1044; *Pittsburgh, etc., R. Co. v. Rogers* (1910), 45 Ind. App. 230, 242, 87 N. E. 28.

Our statute (§343 Burns 1908, §338 R. S. 1881) requires "a statement of the facts constituting the cause of action in plain and concise language, without repetition,
6. and in such manner as to enable a person of common understanding to know what is intended."

The complaint does not depend on inferences for its sufficiency. Defendant was advised of the case it was to meet with sufficient certainty to satisfy the rules of pleading requiring facts to be directly and positively averred, showing that defendant owed a legal duty to the complaining party, which it negligently performed, or negligently failed to perform, to his injury. *Cleveland, etc., R. Co. v. Morrey, supra; Indianapolis, etc., Traction Co. v. Newby* (1910), 45 Ind. App. 540, 543, 90 N. E. 29, 91 N. E. 36.

The first paragraph states a cause of action under the fourth clause of section one of the employers' liability act (§8017 Burns 1908, Acts 1893 p. 294). As the second and third paragraphs contain the same allegations as the first, and some additional averments, they are likewise sufficient as against the demurrer.

The next question arises on the motion of appellant for judgment on the answers to the interrogatories, notwithstanding the general verdict. The substance of the answers, in so far as material to the questions presented, is as follows: The accident occurred on December 11, 1905, on which day appellant had in force the following block-signal rules: "Rule 3. The several positions of train order signals described in Rule 2 will be indicated at night by different colored lights at the top of the signal posts, red signifying danger, stop; green signifying caution, proceed with care; and white signifying safety, no train on the block." Appellant's road passed through Huntington, Bippus, and Servia, Indiana, and at each of said places it maintained a station, consisting of a telegraph office, block-signal system and switches. On said date appellee's decedent, William E. McCalley, was employed by appellant as a locomotive engineer, and had been so employed for seven years immediately prior thereto, and previous to that time as a fireman. Decedent had made frequent trips over said road, and was familiar with the tracks and switches at said places. On said date he was in charge of locomotive No. 776, and a

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freight-train out of Huntington, going west, said train being known as "extra No. 776," and it consisted of two locomotives and about fifty cars. McCalley was the head engineer in charge of the movement and operation of said train. He had received orders to meet No. 74 at Bippus, and when his train approached Bippus, the operator at the station "winked the block," which was done by repeatedly moving the signal up and down, so as to make the different lights appear and disappear. The green light was the signal shown at night to indicate that there was an order—known as "nineteen order"—for the approaching train, and such signal was displayed at Bippus and said McCalley received an order, known as a "nineteen order," at Bippus to meet train No. 74 at Servia. The order received by McCalley at Bippus was as follows: "No. 74, Engine 809, and Extra No. 776, west, will meet at Servia instead of Bippus." As extra No. 776 approached Servia it stopped, and the head brakeman went out from the train, forward to the east switch with a lantern, for the purpose of throwing the switch. The operator at Servia saw extra train No. 776 slow up, or stop, and the brakeman come out from the train towards the east switch, and thereupon said operator gave to said train a white block, which was not given in pursuance of orders from the train dispatcher at Huntington. The block was not "winked" at Servia, as train extra No. 776 approached the east switch, nor at any time preceding the collision, nor did said extra train take the siding at Servia. The only signal displayed at Servia for train No. 776 was a white block, and when so given No. 74 was on the main track, so as to clear the passing track at both the east and west switches, and was there by the order of the dispatcher at Huntington.

On December 11, 1905, and for many years prior thereto, appellant had in force certain rules governing the running of trains and the action of the engineers in charge of them, and McCalley was familiar with said rules prior to and on December 11, 1905, of which the following were then in

force: "No. 522. A train, or any section of a train, must be governed strictly by the terms of orders addressed to it, and must not assume rights not conferred by such orders. * * *" "No. 86. When a train of inferior class meets a train of a superior class, on single track, the train of inferior class must take the siding." "No. 84. * * * (A) East-bound trains have absolute right over west-bound trains of the same class, unless otherwise ordered." "82. All extra trains are of inferior class to all regular trains of whatever class." "19 orders. A green flag by day, or a green light by night, will be displayed by operators having '19 orders' to be delivered. These orders must not be placed so that they can be mistaken for the block signal, and it must be understood that they have no connection whatever with the block signals. They are simply to notify train men that there are '19 orders' for them at that office, which they will go to the office and get, or the operator will hand to them as they pass. The displaying of a colored block signal shall not be understood as authorizing a train to use the main track at a station where, under the general rules, or under orders previously received, they should take the siding."

Train No. 74 was a regular east-bound train, and was superior to extra No. 776. Under the rules of appellant, in force December 11, 1905, it was the duty of a west-bound train to take the side-track at any point where it had orders to meet an east-bound train of the same or superior class. It was the duty of McCalley, as the engineer in charge of train extra No. 776, under orders received by him at Bippus, to take side-track at Servia. It was moonlight at the time of the accident to said McCalley, and at that time appellant had in force rule 232, which provided that engineers must "keep a constant lookout on the track for danger-signals and obstructions." Appellant's track at and near Servia was straight from a point east of the east switch to the point where the accident occurred, and there was no obstruction, at and immediately prior to the time of the accident to Mc

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Calley, which prevented him from seeing the engine of train No. 74 on the main track at Servia. The headlight on McCalley's engine was burning at the time of the accident, and was not smoky at the time of and immediately prior thereto.

Appellant insists that under well-established rules of law, the answers to the interrogatories are in irreconcilable conflict with the general verdict, and especially urges in this connection the finding that the rules of appellant, in force at the time of the accident, known to the decedent, required a west-bound train to take the side-track at any point where it had orders to meet an east-bound train, and also that it was McCalley's duty, as engineer, under his orders received at Bippus, to take the side-track at Servia at the east switch to meet train No. 74. Also that the rules provide that a colored block signal will not authorize a train to use the main track, where under the general rules or orders previously received it should take the siding.

It is apparent that the finding that "it was the duty of McCalley, under orders received at Bippus," to take the switch at Servia, is not the equivalent of a finding based on all the evidence that such was his duty, for the interrogatory expressly limits his duty to the requirements of his orders. Furthermore, the complaint proceeds on the theory that his orders required him to take the siding at Servia, and alleges that he was about to do so when, by signal from the operator, he was called on down the main track.

The general verdict finds every issuable fact in favor of the prevailing party, and in passing on this motion we are not permitted, under our procedure, to consider the

7. evidence, but must look solely to the general verdict, the interrogatories and the answers thereto, and to the facts provable under the issues. *Ittenbach v. Thomas* (1911), 48 Ind. App. 420, 96 N. E. 21; *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662, 64 N. E. 92; *Indiana R. Co. v. Maurer* (1903), 160 Ind. 25, 25 N. E. 156.

Under the issues of this case, proof was admissible to show that notwithstanding the printed rules promulgated by the company, by long usage and custom, a rule was established and known to and acquiesced in by both McCalley and appellant, by which an engineer holding orders requiring him to take his train over the side-track, on receiving the white block signal, meaning "safety, no train on the block," and answering the same, was permitted to take his train down the main track at least as far as the station, notwithstanding the printed rules or previous orders to the contrary known to him. *Pennsylvania Co. v. McCormack* (1892), 131 Ind. 250, 257, 30 N. E. 27; *Springer v. Byram* (1894), 137 Ind. 15, 25, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. 159; *Pittsburgh, etc., R. Co. v. Montgomery* (1898), 152 Ind. 1, 24, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. 301; *Pennsylvania Co. v. Coyer* (1904), 163 Ind. 631, 637, 72 N. E. 875; *Stalcup v. Louisville, etc., R. Co.* (1897), 16 Ind. App. 584, 590, 45 N. E. 802; *Syndicate Improv. Co. v. Bradley* (1895), 6 Wyo. 171, 43 Pac. 79, 84, 44 Pac. 60; *Reese v. Hershey* (1894), 163 Pa. St. 253, 29 Atl. 907, 43 Am. St. 795; *Pennsylvania Co. v. Stoelke* (1882), 104 Ill. 201, 204; *Clark v. Manhattan R. Co.* (1902), 79 N. Y. Supp. 220, 77 App. Div. 284; *Daley v. American Printing Co.* (1891), 152 Mass. 581, 26 N. E. 135.

For the reason above stated and on the authority cited we hold that the trial court did not err in overruling the motion for judgment on the answers to the interrogatories.

We come now to the alleged errors presented by the overruling of the motion for a new trial, which was asked for numerous reasons, among them that the verdict (1) is not sustained by sufficient evidence, and (2) is contrary to law.

If there is evidence tending to prove all the facts essential to appellee's recovery under any paragraph of the complaint, the verdict cannot be disturbed for insufficiency of the evidence. This court will not

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weigh the evidence, but will decide whether there is, or is not, a total failure of evidence to support any material fact essential to a recovery.

It is the duty of a railroad company to adopt and promulgate reasonable rules for the running of its trains and

11. the safety of its employes. It is likewise the duty of an employe to obey such reasonable rules when brought to his notice, and if he violates them, and is injured as a proximate result of such violation, he is guilty of contribu-

12. tory negligence, and cannot recover on account thereof, unless there are other facts which, in the particular instance, excuse the employe, or relieve him from the duty of strict obedience, or unless the rule in question has been in some way abrogated or annulled so as not to be binding on him at the time of his injury. *Cincinnati, etc., R. Co. v. Lang* (1889), 118 Ind. 579, 584, 21 N. E. 317; *Pennsylvania Co. v. Whitcomb* (1887), 111 Ind. 212, 218, 12 N. E. 380; *Pennsylvania Co. v. Coyer, supra*, 638; *Terre Haute, etc., R. Co. v. Becker* (1896), 146 Ind. 202, 217, 45 N. E. 96; *Cleveland, etc., R. Co. v. Gossett* (1909), 172 Ind. 525, 541, 87 N. E. 723; *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, 313, 76 N. E. 1060.

In 5 Thompson, Negligence §5404, the author says: "If an employer knowingly suffers his rules established to promote the safety of his employes to be habitually vio-

13. lated by them, they will be treated as having been abrogated with his consent, and he will not be permitted to set up a violation of such a rule in an action against him by an employe, or by his representative in case of his decease, as contributory negligence and as a reason why he should not recover. The reason is that a rule, although established and published in writing, may as well be abrogated by the author of it by acts or neglect *in pais*, as by an affirmative order or proclamation to that effect. The master will not be permitted to suffer a general nonobservance of a rule designed to promote the safety of his serv-

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ants, and then to revive it for the purpose of tripping up and defeating the action of a particular servant, who, but for the rule, has an action against him for damages. He will not be allowed to neglect it and to let it fall into disuse as to his servants generally, and then to revive it and enforce it after the fact against a particular servant who is suing him for damages.”

On the subject of when a rule may be considered abrogated, the same author says: “The abrogation by an employer of a rule governing the conduct of employes may be presumed when it is frequently and openly violated for such a length of time that the company could, by the use of ordinary care, have ascertained its nonobservance; and mere nonobservance thereof by an employe does not render him guilty of contributory negligence, precluding recovery for injuries which might have been avoided if he had observed it.” 5 Thompson, Negligence §5404.

In *Farris v. Southern R. Co.* (1909), 151 N. C. 483, 66 S. E. 457, the defendant was held charged with knowledge of a custom among its employes in crossing its tracks, where the custom had existed for six months.

The same court held that knowledge was shown of a custom of employes to ride on an engine, where the evidence showed the custom to have been in vogue for nine years. *Heilig v. Southern R. Co.* (1910), 152 N. C. 469, 67 S. E. 1009.

In *Barry v. Hannibal, etc., R. Co.* (1888), 98 Mo. 62, 11 S. W. 308, 14 Am. St. 610, where a rule of the company stated that an engineer must not permit the fireman to operate the engine, except when the engineer himself is on the engine, and required both to remain on the engine while on duty, and the engineer was injured while off his engine, it was held that negligence of the engineer could not, on such facts, be ruled as a matter of law, and that where there was an established usage of the company’s engineers, known and acquiesced in by its superior officers, to allow an engineer to

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alight from his engine, and to permit his fireman to make short moves, the engineer remaining near enough to give directions, such custom amounted to an abandonment of the rule to the extent of the custom.

The supreme court of Michigan has held that violation of the rules of the company will defeat recovery, but that an exception exists where the "company itself has sanctioned the custom of its employes to act in violation of the rules, and has thus virtually abrogated them. This exception is based upon the theory that it would be unjust in employers to establish rules, and then sanction their violation, and interpose such violation as a defense. * * * Only when this rule is violated by brakemen so universally and notoriously that it is a fair inference that the company sanctioned and approved the violation is the company barred from this defense." *Nichols v. Chicago, etc., R. Co.* (1900), 125 Mich. 394, 397, 84 N. W. 470.

In *Cleveland, etc., R. Co. v. Gossett, supra*, 543, our Supreme Court, in speaking of the violation of rules, said: "There are, however, a great many circumstances attending the violation of rules which modify the act and give it such character, with respect to negligence, as will make it a question for the jury."

In *Kane v. Erie R. Co.* (1906), 142 Fed. 682, 73 C. C. A. 672, where it was shown to be a part of the duty of a fireman to clean the engine, and it was proved that it was the custom on defendant's road for a fireman to do the work while the engine was moving, and such custom was known to and sanctioned by the company, although there was a rule in force forbidding a fireman so to do, it was held that the effect of such custom was to abrogate the rule, and that the fireman could not, as a matter of law, be held guilty of contributory negligence, preventing a recovery, for an injury received while so cleaning his engine; that the question was one for the jury. To the same effect are the following cases: *Brady v. New York, etc., R. Co.* (1903), 184 Mass. 225, 228,

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68 N. E. 227; *Galveston, etc., R. Co. v. Sweeney* (1896), 14 Tex. Civ. App. 216, 36 S. W. 800; *Gulf, etc., R. Co. v. Knox* (1901), 25 Tex. Civ. App. 450, 61 S. W. 969; *Sutherland v. Troy, etc., R. Co.* (1891), 125 N. Y. 737, 26 N. E. 609; *Somerset, etc., R. Co. v. Galbraith* (1885), 109 Pa. St. 32, 1 Atl. 371; *Kane v. Northern Cent. R. Co.* (1888), 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Baltimore, etc., R. Co. v. Leathers* (1895), 12 Ind. App. 544, 40 N. E. 1094; 5 Thompson, Negligence §§5404-5408, and cases cited.

Considering only the rules and the orders held by appellee's decedent, it is apparent that he should have taken the siding at Servia, notwithstanding the white block signal given to him by the operator, and that failing so to do he was guilty of negligence which contributed to his injury, and should prevent a recovery. But under the issues we are required to go farther, and ascertain whether there is some evidence from which the jury may have rightfully found that he was not guilty of negligence in using the main track, notwithstanding the rules of the company and the orders held by him.

In passing on the motion for judgment on the answers to the interrogatories, we have held that the special verdict is not in irreconcilable conflict with the general verdict because, under the issues, evidence was admissible to prove a custom establishing a rule of operating trains on appellant's road which would so modify or annul the printed rules as to authorize McCalley to proceed on down the main track to the station at Servia, without being guilty of contributory negligence as indicated by the printed rules.

In passing on the error assigned in overruling the motion for a new trial, asked on the ground of the insufficiency of the evidence, we are not permitted to determine the question from the evidence admissible under the issues, independent of the evidence actually shown by the record, nor are we to weigh the evidence if conflicting on that issue, but we must determine whether there is any evi-

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dence in the record from which the jury may have found such custom to be established, and binding on appellant.

It is not questioned by appellant, but on the contrary it asserts, that an engineer holding orders requiring him to take the siding at a certain place on appellant's road, on approaching the station at such place, may proceed on down the main track to the station, if before so doing the block is winked, and in addition thereto, at night a green light is displayed or in the daytime a green flag.

There is evidence tending to prove that winking the block is done by moving the semaphore up and down, and that in

so doing the lights are changed from red to white,

16. and there is other testimony to the effect that colors other than red and white also appear in winking the block; that there is no difference in dropping the block and winking the block; that when an engineer approaches a station on appellant's road, under orders to take the siding, he may be called down to the station to get a meeting or nineteen order, without stopping his train, by the winking of the block; that on seeing the light changed to white the engineer answers the signal by sounding his whistle, and if the light remains white he moves down the main track to the station, and is governed by the orders there received; there was also other testimony to the effect that he should not do so unless, in addition to the winking of the block, a green light other than that of the semaphore was displayed at the station; that trains do not usually stop to receive such orders, but they are handed on as the train passes; that it was the usual custom on appellant's road at the time of the accident when the white block was given an approaching train, having orders to take the siding at that station, not to go in on the switch, but to proceed on down the main track to the station for orders; that it had been a custom among engineers on appellant's road for about five years prior to the accident, on approaching a station under orders requiring them to take the siding, on the winking of the block, to

run their trains down to the station on the main track for an order; that for thirteen years prior to the accident such custom was known to and approved by appellant's train master; that a white block at Servia meant that there was no train on the track, between that place and Boliver, the next station west; that there was no written or printed rule in force on appellant's road, and never had been, requiring engineers to take their trains down the main track to the station on seeing the nineteen order signal displayed; that when decedent approached the east switch at Servia he stopped his train and sent his head brakeman forward to throw the switch preparatory to taking his train in on the siding; that the operator saw the brakeman approaching the switch and threw the block from red to white, and McCalley answered the signal by sounding the whistle, and immediately "pulled down the main track" to the station; that the block lights were visible, but looking down the main track in the direction of the station no headlight or train was visible until McCalley's engine was within two or three car lengths of the engine with which he collided.

The question here presented is that of the contributory negligence of decedent. *Diamond Block Coal Co. v. Cuthbertson, supra*, 313.

Can it be said that a person of ordinary prudence would not have done as the decedent did under all the facts of this case as disclosed by the evidence, or can it be said, as a matter of law, that he was guilty of negligence contributing to the collision which caused his death, by running his train down the main track to the station, instead of taking the siding?

Where the evidence is undisputed, and all tends to show contributory negligence, the question is one of law for the court. But where it is conflicting on the subject, or

17. is of such a character that reasonable minds may draw different conclusions therefrom, the question of contributory negligence is one of fact to be submitted to and de-

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cided by the jury. The jury has the right to consider
18. all the evidence, and determine its weight as applied to any issuable fact in the case, and also to consider what may be reasonably inferred from what is thus proved.

If there is any conflict in the evidence given on the trial on the subject of contributory negligence, no matter what its weight or character, nor to what extent it is appar-

19. ently overborne or contradicted by other evidence, the decision of the issue should be submitted to the jury. *Beaning v. South Bend Electric Co.* (1910), 45 Ind. App. 261, 267, 90 N. E. 786; *Haughton v. Aetna Life Ins. Co.* (1905), 165 Ind. 32, 40, 73 N. E. 592, 74 N. E. 613; *Diamond Block Coal Co. v. Cuthbertson*, *supra*, 306; *Farmers Nat. Bank v. Coyner* (1909), 44 Ind. App. 335, 338, 88 N. E. 856; *Cleveland, etc., R. Co. v. Gossett*, *supra*, 537; *Collins v. Catholic Order, etc.*, (1909), 43 Ind. App. 549, 559, 88 N. E. 87.

We conclude, therefore, that the question of the
16. contributory negligence of appellee's decedent was properly submitted to the jury.

There was evidence tending to prove a custom from which the jury in weighing the evidence could find the decedent free from negligence in running his train down the main track to the station at Servia, and also that such custom was known to and acquiesced in by appellant.

The jury having so found, on the facts of this
20. case, we are not warranted in reversing the judgment for insufficiency of the evidence to support the verdict.

A new trial was also asked on account of alleged errors in giving certain instructions and in refusing certain instructions tendered by appellant. What we have said on other questions in this opinion is applicable to some of the questions raised on the instructions, and need not be repeated.

Instructions five, eighteen and nineteen, tendered by appellant, and refused, present phases of the proposition that

appellee must recover on the allegations of negligence
21. charged in his complaint, or not at all. These were proper instructions but the same questions were covered by other instructions given by the court.

Instruction five told the jury that if the alleged signal complained of was given by order of the train dispatcher,
22. there could be no recovery on that account, as the negligence charged in regard to the signal was that of the operator.

The jury in answer to interrogatory twenty-two and one-half expressly found that the signal was not given by order of the train dispatcher, so that if there was error in refusing the instruction it was harmless to appellant.

By different language, most that is included in instructions eighteen and nineteen, refused, is included
21. in twenty-one, tendered by appellant and given by the court.

Complaint is also made of the refusal of instruction eight, but the record affirmatively shows that it was given.

Instruction fourteen, tendered by appellant and refused, told the jury, in effect, that appellee's decedent could not recover if he violated his orders in taking his train over the main track to the station at Servia. But the court gave instruction nine, tendered by appellant, which told the jury that if McCalley was "injured or killed without fault on the company's part, or by reason of his failure to comply with the orders, rules and directions of the company, he cannot recover," nor can his administrator.

The other instructions refused were sufficiently covered by those given, to render harmless their refusal.

Complaint is also made of the giving of instruction four, tendered by appellee, on the measure of damages. This instruction is incomplete, but states the law correctly
23. as far as it goes, and the error in giving it, if any, is waived by appellant by failure to tender a more complete instruction on the subject. Elliott, App. Proc. §§647,

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736; *Fitzgerald v. Goff* (1884), 99 Ind. 28, 39; *New Castle Bridge Co. v. Doty* (1907), 168 Ind. 259, 266, 79 N. E. 485; *Voris v. Shotts* (1898), 20 Ind. App. 220, 223, 50 N. E. 484.

Furthermore, on the facts of this case, the size of
24. the verdict is such as to warrant the conclusion that appellant was not harmed by the instruction.

The court gave instructions covering the non-liability of appellant, where the injury resulted from the inexcusable violation of its reasonable rules and of its orders, in such way as clearly to set before the jury the defense made to the suit. The instructions taken as a whole state the law fully and fairly to both parties, and there is no available error shown by the refusal, or in the giving of instructions.

The objections made to the admission and to the exclusion of certain evidence present no questions merit-
25. ing extended consideration, for it is apparent from the record that appellant was not harmed by any of such rulings.

The court did not err in overruling the motion for a new trial. No error harmful to appellant appearing in the record, the judgment is affirmed.

Myers, Hottel, Ibach, Adams and Lairy, JJ., concur.

NOTE.—Reported in 96 N. E. 649. See, also, under (1) 31 Cyc. 115; (2) 26 Cyc. 1384; (4, 5) 31 Cyc. 54; (6) 26 Cyc. 1392; (7) 38 Cyc. 1930; (8) 26 Cyc. 1440; (9) 26 Cyc. 1513; (10) 3 Cyc. 348; (11) 26 Cyc. 1157; (12) 26 Cyc. 1162; (13) 26 Cyc. 1161; (14) 3 Cyc. 347, 348; (15) 3 Cyc. 318, 319; (16) 26 Cyc. 1482; (17) 29 Cyc. 630; (18) 38 Cyc. 1517; (19) 29 Cyc. 633; (20) 3 Cyc. 348; (21) 38 Cyc. 1711; (22) 38 Cyc. 1817; (23) 38 Cyc. 1693; (24) 38 Cyc. 1814; (25) 38 Cyc. 1411, 1450. For a discussion of the disobedience of the rules or regulations of a master as affecting the right of a servant to recover for personal injuries, see 8 Ann. Cas. 3; 10 Ann. Cas. 152; Ann. Cas. 1912A 84. As to pleading and practice under Lord Campbell's Act and kindred enactments, see 48 Am. Dec. 636. As to the want of due care by a telegraph operator in controlling train movements, see 75 Am. St. 637.

**LAKE ERIE AND WESTERN RAILROAD COMPANY
v. BEALS.**

[No. 7,645. Filed May 17, 1912.]

1. **NEGLIGENCE.—Complaint.—Allegations of Several Acts of Negligence.—Proof.**—Several charges of negligence may be embodied in one paragraph of complaint, and proof of one will be sufficient unless the acts of negligence charged are so related and dependent upon each other as to show that the injury complained of resulted from the combined acts. p. 453.
2. **CARRIERS.—Railroads.—Passengers.—Assistance in Alighting.—Duty of Carrier.**—Where a carrier has provided a safe and suitable place for passengers to alight and gives them a reasonable time to do so, it is not ordinarily required to tender assistance to a passenger in the act of alighting, except where by reason of sickness, age, infirmity, or some other cause known to the carrier or its servants, he is in need of assistance. p. 453.
3. **CARRIERS.—Railroads.—Passengers.—Negligence.—Failure to Assist Passenger in Alighting.—Complaint.—Sufficiency.**—In an action by a railroad passenger to recover for injuries in alighting from a train, a complaint, charging several acts of negligence, and charging negligence in the failure of defendant's servants to assist plaintiff in alighting, was insufficient as to such charge, where there were no allegations showing a duty to render such assistance or that the failure to render such assistance was the cause of the injury. p. 454.
4. **CARRIERS.—Railroads.—Passengers.—Complaint.—Allegation of Negligence.—Sufficiency.**—A complaint by a passenger for injuries in alighting from a train, alleging that while plaintiff was in the act of alighting, the defendant's servants negligently, and without notice caused the train to start suddenly with such speed as violently to throw plaintiff to the platform, sufficiently charged negligence without averring the particular duty which was violated, or the particular acts or omissions which constituted such violation of duty. p. 454.
5. **NEGLIGENCE.—Complaint.—Allegations.—Motion to Make Specific.**—Where a complaint charges that an act was negligently done, and it is desired that it should be more specific as to the duty violated, or the particular acts or omissions which constituted the violation, the defendant's remedy is by a motion to that effect. p. 454.
6. **CARRIERS.—Railroads.—Passengers.—Complaint.—Allegation of Negligence.—Proof.**—In support of an allegation that while plaintiff was alighting from a train the servants of defendant railroad

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company negligently and without notice caused the train to start suddenly with such speed as to throw plaintiff to the station platform, plaintiff is permitted to prove any act or omission, in reference to the starting of the train, which constituted the violation of any duty owing to plaintiff as a passenger. pp. 455, 456.

7. **CARRIERS.—Railroads.—Passengers Alighting.—Duty of Carrier.**—A railroad company owes a passenger the duty to allow a reasonable time to alight before again putting the train in motion. p. 455.

8. **CARRIERS.—Railroads.—Passengers Alighting.—Negligence.—Starting Train.**—A railroad company will be held guilty of a breach of duty amounting to negligence in starting the train, if its servants caused the train to be started with knowledge that at the time a passenger is in the act of alighting, even though a reasonable time had been allowed for all passengers to alight. p. 455.

9. **CARRIERS.—Railroads.—Passengers Alighting.—Negligence.**—Where a railroad company stops its train at the station platform a sufficient length of time to allow passengers a reasonable opportunity to alight, the sudden starting of the train will not constitute negligence even though a passenger is at the time alighting, unless such fact is known to the servants of the company who give the directions to start the train. p. 455.

10. **TRIAL.—Instructions.—Application to Case.**—The instructions to a jury should state the law correctly in view of the issues and the evidence. p. 456.

11. **CARRIERS.—Railroads.—Passengers.—Instructions.—Injuries in Alighting.—Negligence.**—In an action by a railroad passenger for injuries caused by negligently starting the train while the passenger was in the act of alighting, an instruction that it was the duty of defendant's servants, before starting the train, to exercise reasonable care to inform themselves as to whether passengers were in the act of getting off, and, if they were trying to get off, to leave the car standing a sufficient time for all passengers, including the plaintiff, to get off in safety, was erroneous in that it required defendant to ascertain whether a passenger was in the act of alighting before starting the train, regardless of whether a reasonable time had been allowed for passengers to alight. p. 456.

12. **CARRIERS.—Railroads.—Duty as to Passengers Alighting.—Rule as to Street-Car Passengers Not Applicable.**—While the conductor of a street-car must use the highest degree of care to see that no person is in the act of alighting at the time the car is started, the rule does not apply in the operation of a railroad passenger-train. p. 457.

13. **CARRIERS.—Railroads.—Passenger Alighting from Train.—Negligence.—Instructions.—Conformity to the Issues.**—In an action by a passenger for injuries sustained in alighting from a

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train, where the question of negligence in failing to assist the plaintiff in alighting was not in issue, the giving of an instruction on that subject was error, although the instruction given was a correct statement of the law as an abstract proposition. pp. 457, 459.

14. **CARRIERS.—Railroads.—Duty as to Passengers Alighting.—Instructions.—Refusal.**—In an action against a railroad company by a passenger for injuries caused by alleged negligence in suddenly starting the train while plaintiff was in the act of alighting therefrom, the refusal of instructions tendered by defendant, which correctly defined and limited the duties of the defendant with reference to the stopping of trains to discharge passengers, the length of time trains should remain standing for that purpose, and the care required in again putting the same in motion, was erroneous. p. 459.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action by Juliet Beals against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

John B. Cockrum, Shirts & Fertig, for appellant.

Kane & Kane and *Joseph A. Roberts*, for appellee.

LAIRY, J.—Appellee brought this action, as a passenger, against appellant for injuries sustained by her in alighting from one of appellant's trains in the city of Noblesville, Indiana. It appears from the averments of the complaint that appellee boarded a train of appellant company at Indianapolis, to be carried as a passenger to Noblesville, and that when the train arrived at the latter station, at about seven o'clock in the evening, it was stopped for the purpose of allowing passengers to alight therefrom. The allegations of the complaint in respect to the negligence of appellant are as follows: "That plaintiff as soon as the train stopped immediately started from her seat in said car to the platform thereof and down the steps toward the station platform without halt or delay until she was on the steps of the car, at which time she, noticing that no one of defendant's servants or other person was present to assist her in alighting hesitated a few seconds while looking for such assistance

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but no one being there to assist her and the defendant's servants negligently failing to come to assist her to alight she proceeded to the lower step of the car and was in the act of alighting therefrom to the station platform when the defendant's servants in charge of said train negligently and without notice caused the train and car to suddenly start with such speed as to jerk and throw plaintiff violently to and on the station platform and was thereby badly injured, etc. * * * That said injuries were caused wholly through and by the fault and negligence of the defendant."

The averments of the complaint indicate an attempt on the part of the pleader to state several acts of negligence;

but it is not improper to embody several charges of

1. negligence in one paragraph of complaint, and proof of one will be sufficient, unless the acts of negligence charged are so related and so dependent on each other as to show that the injury complained of resulted from the combined acts of negligence. *Long v. Doxey* (1875), 50 Ind. 385; *Fort Wayne, etc., Traction Co. v. Crosbie* (1907), 169 Ind. 281, 81 N. E. 474, 13 L. R. A. (N. S.) 1214, 14 Ann. Cas. 117; *Louisville, etc., Traction Co. v. Short* (1908), 41 Ind. App. 570, 83 N. E. 265.

There is no direct averment in the complaint that the servants of appellant failed or neglected to assist appellee to alight, the averments on that subject being by way of recital merely; but even though these averments should be given force, there is no averment that appellee was sick and infirm, or that she was otherwise in need of assistance. If

a carrier has provided a safe and suitable place for

2. passengers to alight, and has brought his conveyance to a stop at that place, and given a reasonable time for all passengers to alight, it is not ordinarily a part of the duty of the servants of such carrier to tender assistance to passengers who are in the act of alighting from the train. This duty arises only in cases where the passenger, by reason of sickness, age, infirmity, or some other cause known to

the carrier or his servants, is in need of assistance; or where the place provided for the passenger to alight is of such a character as to render assistance reasonably necessary. *Illinois Cent. R. Co. v. Cruse* (1906), 123 Ky. 463, 96 S. W. 821, 8 L. R. A. (N. S.) 299, 13 Ann. Cas. 593; *Gulf, etc., R. Co. v. Garner* (1908), 52 Tex. Civ. App. 387, 115 S. W. 273; *Raben v. Central Iowa R. Co.* (1887), 73 Iowa 579, 35 N. W. 645, 5 Am. St. 708; 2 Hutchinson, Carriers (3d ed.) §1127. As there is no averment of any fact showing that ap-

pellant or its servants owed any duty to appellee to

3. assist her in alighting from the train, and as the complaint fails to aver that the fall of appellee and the resulting injury was caused by the failure to render such assistance, we think that the complaint is insufficient to sustain a recovery on this charge of negligence.

The complaint, however, contains the general averment that while appellee was in the act of alighting from the steps of the car to the station platform, the servants of ap-

4. pellant, negligently and without notice caused said train and car suddenly to start with such speed as to throw appellee violently to the station platform. It has frequently been held by this court and the Supreme Court that it is a sufficient charge of negligence to aver that an act was negligently done, without specifying the particular duty which was violated, or the particular acts or omissions which constituted such violation of duty. *Pittsburgh, etc., R. Co. v. Collins* (1904), 163 Ind. 569, 71 N. E. 661; *Lake Erie, etc., R. Co. v. Moore* (1908), 42 Ind. App. 32, 81 N. E. 85, 84 N. E. 506. If it is desired that the complaint

5. should be more specific in these particulars, the defendant should make a motion to that effect; but, in the absence of such a motion, the complaint will be held good as against a demurrer. *Louisville, etc., R. Co. v. Bates* (1897), 146 Ind. 564, 45 N. E. 108; *Tipton Light, etc., Co. v. Newcomer* (1901), 156 Ind. 348, 58 N. E. 842.

In support of this allegation, appellee would be permitted

to prove any and every act or omission in reference to the starting of the train, which constituted the violation

6. of any duty owing to her as a passenger. Having reached the station at which appellee was to get off, and having stopped its train at the platform, the company owed appellee the duty to allow a reasonable time

7. for her to alight before again putting the train in motion. If appellant failed in this duty, and started the train without allowing a reasonable time for appellee to alight, this would be a negligent starting of the train within the meaning of the general averment. Appellant

8. would also be held guilty of a breach of duty amounting to negligence in starting the train, if its servants caused the train to be started, knowing that appellee was at the time in the act of alighting from the train, and this would be true even though a reasonable time had been allowed for all passengers to alight. *Highland Ave., etc., R. Co. v. Burt* (1890), 92 Ala. 291, 9 South. 410, 13 L. R. A. 95; *Straus v. Kansas City, etc., R. Co.* (1881), 75 Mo. 185; *Moore, Carriers* 185.

It is argued that the averment in the complaint in respect to the negligent starting of the train is not such a general averment of negligence in that respect as would authorize proof of any and every act or omission in starting the train amounting to a breach of duty owing to appellee. It is claimed that the acts which appellee relies on as constituting the negligence of appellant in starting the train are specifically alleged, in that it is stated that the servants of appellant caused said train to start suddenly, without notice, and with such speed as to throw appellee violently to the platform. If appellant stopped its train at the station

9. platform a sufficient length of time to allow appellee a reasonable opportunity to alight, it then had a right to start it suddenly and without notice; and the fact that it did so would not constitute negligence, even though appellee was at the time in the act of alighting, or was otherwise in

a place of danger, unless such position of appellee was within the knowledge of the servants of the company who gave directions to start the train. *Harris v. Gulf, etc., R. Co.* (1904), 36 Tex. Civ. App. 94, 80 S. W. 1023; *Hurt v. St. Louis, etc., R. Co.* (1887), 94 Mo. 255, 7 S. W. 1, 4 Am. St. 374; 4 Elliott, Railroads §1628. It cannot be said,

6. therefore, that the averment that the train was started suddenly and without notice, amounts to such a specific charge of negligence in starting the train as to preclude proof of the breach of any duty arising out of such act, not specifically alleged.

Under the pleadings, the negligence charged against appellant was limited to the starting of the train. If the train was started before appellee had been allowed a reasonable time to alight in safety, and if her injury resulted as a consequence, appellant is liable; or if the conductor gave a signal to start the train when he knew that appellee was in the act of alighting, she may recover for any injury thereby occasioned. These questions should have been fairly submitted to the jury under the law and the evidence. The

10. instructions to the jury should state the law correctly in view of the issues and the evidence. *Patterson v. Doe* (1846), 8 Blackf. 237; *Terre Haute Electric Co. v. Roberts* (1910), 174 Ind. 351, 91 N. E. 941.

We do not think that the questions of fact in issue were fairly submitted to the jury for its decision by the instructions given in this case. The court at the request of

11. appellee gave to the jury instructions one and two, which were objected to by appellant. Instruction one is as follows: "The plaintiff in this cause alleges in her complaint that at the time of the accident she was a passenger on the defendant's railroad train, and I charge you that if under the evidence you find that the plaintiff was at said time a passenger on the defendant's railroad train, intended to alight from said train at Noblesville, which was her destination, it was the duty of defendant's servants in charge of

said train, before starting the same to exercise reasonable care to inform themselves as to whether or not passengers were in the act of getting off the same and if they were trying to get off to leave said car standing a sufficient length of time for all passengers, including the plaintiff, to get off said car in safety.’’

Under this instruction a steam railway, engaged as a carrier of passengers, would be required to use care to ascertain whether a passenger was in the act of alighting from any of its cars before putting the train in motion, regardless of the fact that a reasonable time had been allowed for all passengers to alight before the train was put in motion. This is not the law as applied to the operation of steam railways. Where the train has been stopped for a length of time sufficient to enable all passengers, without haste or confusion, to leave the train safely, the conductor then has a right to presume that they have done so, and he may start the train without causing an examination to be made of each of the car platforms before doing so. *Straus v. Kansas City, etc., R. Co., supra; Louisville, etc., R. Co. v. Espenscheid* (1897), 17 Ind. App. 558, 47 N. E. 186; *Raben v. Central Iowa R. Co., supra; Imhoff v. Chicago, etc., R. Co.* (1866), 20 Wis. 362.

A different rule for a different reason has been applied to the operation of street-cars. The conductor of a street-car must use the highest degree of care to see that no person is in the act of alighting at the time the car is started. *Highland Ave., etc., R. Co. v. Burt, supra; Birmingham Union R. Co. v. Smith* (1889), 90 Ala. 60, 8 South. 86, 24 Am. St. 761; *Crump v. Davis* (1904), 33 Ind. App. 88, 70 N. E. 886.

Instruction two, requested by appellee and given by the court, is as follows: “When a passenger enters the car of the railroad company for transportation over its road,
13. he or she, places his or her person in the custody of the railroad company, and has the right to rely upon

the railroad company's discharging its duty to provide for his or her safety; this duty involves the providing by the company of such suitable and proper assistance from the trainmen and employes as may be necessary to enable the passenger to alight from the train, and the stopping of trains at its station in a proper place and for a sufficient length of time to enable the passengers to alight from the train in safety, and if the company is negligent in failing to discharge all or any of the foregoing duties, and the passenger is injured by such failure without fault or negligence on his or her part, the company is liable for the injury sustained." This instruction contains a correct statement of the law as an abstract proposition, and, in a proper case where the pleadings and evidence warrant such an instruction, it should be given. *Lake Erie, etc., R. Co. v. Taylor* (1900), 25 Ind. App. 679, 58 N. E. 852. In this case, however, we have held that the question of the negligence of the servants of appellant, in failing to assist appellee to alight in safety, is not presented by the pleadings, and for that reason no instruction bearing on this question should have been given.

The court refused to give instructions three, four, six, ten and eleven, requested by appellant. Instructions six and ten are as follows: "(6) If you find that the plaintiff was in good health and not suffering from any physical infirmities and was able to walk and go about without assistance and as an ordinary person, and if, by the exercise of reasonable diligence and expedition the plaintiff could have left her seat in said car and proceeded to the steps of said car and alighted therefrom in safety before said train started to leave the station, and if none of the defendant's servants had any knowledge that plaintiff intended to alight, then you should find for the defendant." "(10) It is the duty of the railroad to stop its trains for a reasonable time at way stations in order that passengers may get on or off the cars with safety; and the railroad company is liable

when its conductor, or other servant, gives a signal while a passenger is obviously in the act of getting on or off its said train; but if the train has stopped a reasonable time, and the passenger has given no notice of an intention to alight, and the conductor does not see him in the act of alighting, the railroad company is not liable for the act of the conductor in starting the train.”

In view of the issues and the evidence in this case, it was important that the jury should be fully and correctly in-

structed as to the duties which the law imposes on
14. steam railways in reference to the stopping of their trains to discharge and receive passengers, the length of time they should remain standing for that purpose, and the care required by such carriers in again putting such train in motion. Instructions six and ten, just recited, correctly define and properly limit the duties of appellant in this respect, and the court erred in refusing to give them.

Instruction eleven, tendered by appellant and refused, is quite lengthy, and need not be set out. The jury is informed by this instruction that if they find certain facts to be true, their verdict should be for appellant. Appellee has not pointed out any objection to this instruction, and we fail to discover any. In our opinion, this instruction should have been given.

The third and fourth instructions tendered, relate to the duties of the servants of a carrier in assisting pas-
13. sengers to alight. Under the issues in this case, there was no error in refusing these instructions.

It is possible that if the question involved had been properly submitted to the jury under proper instructions the result might have been the same; but we have no means of knowing that it would not have been different. Appellant was entitled to have the issues of fact presented to the jury for its decision under proper instructions from the court. As this was not done a new trial should be granted. The

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judgment is therefore reversed, with directions to grant a new trial. It is also ordered that appellee be given leave to amend her complaint if desired.

NOTE.—Reported in 98 N. E. 453. See, also, under (1) 28 Cyc. 587; (2) 6 Cyc. 611; (3) 6 Cyc. 611, 626; (4) 6 Cyc. 626; (5) 31 Cyc. 644, 650; (6) 29 Cyc. 584; (7) 6 Cyc. 612; (8, 9) 6 Cyc. 613; (10) 38 Cyc. 1612, 1617; (11, 13, 14) 1913 Cyc. Ann. 771; (12) 6 Cyc. 612, 615. On the carrier's duty to guide or conduct passenger to or from train, see 20 L. R. A. (N. S.) 1041. As to the liability of a carrier for assistance negligently rendered passenger by employe, see 10 L. R. A. (N. S.) 411. As to carrier's duty to see that passenger has alighted before starting train at station, see 25 L. R. A. (N. S.) 217. As to the duty of a street-car conductor to see that passenger is off before starting the car, see 11 L. R. A. (N. S.) 140. For time allowed passenger to alight, see 4 L. R. A. (N. S.) 140. As to the doctrine that a carrier's duty towards a passenger extends not only to transporting him safely but seeing him safely alight, see 77 Am. St. 27. As to the carrier's duty with reference to time and place for alighting, see 7 Am. St. 833. As to the duty of a railroad company to allow passengers time to board or alight from trains, see 7 Ann. Cas. 760; 14 Ann. Cas. 962; Ann. Cas. 1912C 794.

PATTERSON v. MIDDLE SCHOOL TOWNSHIP, HENDRICKS COUNTY.

[No. 8,197. Filed May 17, 1912.]

1. **SCHOOLS AND SCHOOL DISTRICTS.**—*Discontinuance of Schools.*—*Transportation of Pupils Transferred.*—*Statute.*—*Construction.*—Section 6423 Burns 1908, Acts 1907 p. 444, making it the duty of the township trustee to provide for the education of pupils affected by the discontinuance of a school, and to provide means of transportation for such pupils who live certain distances from the school to which they are transferred, is remedial and administrative in its character, and should be liberally construed. p. 464.
2. **OFFICERS.**—*Township Trustee.*—*Contracts.*—*Validity.*—*Statute.*—Contracts made in violation of §9598 Burns 1908, Acts 1899 p. 150, §9, providing that when a township trustee desires to purchase school furniture, fixtures, maps, charts or other supplies, excepting fuel and literary periodicals, authorized by the advisory board, he should make an itemized estimate to be used by bidders, are absolutely void and cannot be enforced. p. 465.

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3. **OFFICERS.—Township Trustee.—Powers.**—Persons doing business with a township trustee are bound to take notice of the extent of his authority, and that his powers are only such as are expressly given by statute, or are necessarily implied therefrom. p. 465.
4. **OFFICERS.—Township Trustee.—Contracts.—Validity.—Estoppel of Township.**—Where a township trustee does not proceed in the manner provided by the statute under which he seeks to bind his township, the contract is void and no subsequent act can estop the township from setting up its invalidity. p. 465.
5. **SCHOOLS AND SCHOOL DISTRICTS.—Transportation of Pupils.—Contract.—Notice.**—Section 9598 Burns 1908, Acts 1899 p. 150, §9, relates only to building or repairing school houses, and furnishing school supplies, other than fuel and literary periodicals, and does not require notice to be given by the township trustee before letting a contract for the transportation of children. p. 466.
6. **SCHOOLS AND SCHOOL DISTRICTS.—Transportation of Pupils.—Duty of Trustee.—Contract.—Validity.**—Under §6423 Burns 1908, Acts 1907 p. 444, a township trustee is compelled to provide means of transportation for children affected by the discontinuance of the school in the district where they reside if they reside certain distances from the school which they are required to attend after such discontinuance, and where there was an unexpended appropriation for the purpose, a contract made by the township trustee for the transportation of pupils entitled to such transportation under the statute, though made without notice, was, in the absence of a statute requiring notice to be given of the letting of the contract, enforceable against the township, and was not affected by the fact that the pupils so transported became of school age long after the school of the district in which they resided had been discontinued. p. 466.

From Hendricks Circuit Court; *James L. Clark*, Judge.

Action by Virgil Patterson against Middle School Township, Hendricks County. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Edgar M. Blessing, for appellant.

George W. Brill, George C. Harvey, Thomas J. Cofer and *Zimri E. Dougan*, for appellee.

ADAMS, J.—This action was brought by appellant to recover on a written contract with the trustee of appellee township, for transportation of school children. On request, the

court made a special finding of facts, and stated its conclusion of law thereon. The only error assigned on appeal is that the court erred in stating its conclusion of law on the facts found.

In support of the judgment, appellee submits that the contract in controversy was entered into without authority of law, in that no notice was given of the letting of the contract, no bids were received therefor, and the advisory board of appellee township was not present, and did not participate in the making of said contract; that children reaching school age after the abandonment of a school in the district of their residence are not entitled to transportation, under §6423 Burns 1908, Acts 1907 p. 444; that the court does not find that the trustee of appellee township transferred such children prior to the making of the contract in controversy, which is in effect a finding that they were not transferred.

In its first, second and third findings, the court found that on September 28, 1908, there was on hand the sum of \$700 appropriated by the advisory board of Middle Township in 1907, for the employment of janitors for the schools in said township, and for the hauling of children to said schools during the year 1908; that on said date the trustee of appellee township entered into a written contract with appellant, wherein the latter agreed to haul the children in said township residing on what is designated in the contract as "route number one," to school number six, and was to receive the sum of \$2 per day therefor; that appellant complied with his contract, which required his services for sixty-five days; and that he has not received any compensation for his said services.

Findings four and five are as follows: "(4) The trustee of said township did not before entering into said contract with said plaintiff, advertise in any way or give notice of the public letting of a contract for the performance of said services, and received no bids therefor, and the advisory board of said township did not participate in the mak-

ing of said contract, and were not present when the same was made. (5) None of the children residing along said route number one, and who were hauled by said plaintiff under said contract, resided nearer than one mile to said school number six, and some of them resided more than two miles from said school, and all but one or two of them were over six and under twelve years of age. There were about twelve of said children and all of them resided in a portion of said Middle Township which had at one time been a school district having a school house therein, and was known and designated as District Number Four. The school in said district had been abandoned about ten years before the making of said contract, and there had been no school in said district at any time after the children or any of the children hauled or to be hauled by plaintiff under the said contract had been of school age, and none of the children had at any time attended a school in said District Number Four.”

On the facts found, the court stated as its conclusion that the law was with the defendant, and plaintiff was not entitled to recover. Exception to the conclusion of law was reserved by appellant, and judgment rendered for appellee.

Section 9598 Burns 1908, Acts 1899 p. 150, §9, provides that “If a trustee finds it necessary to erect a new school house, he shall procure suitable specifications therefor, to be used by the bidders in bidding and in the construction of such house. If he desires to purchase any school furniture, fixtures, maps, charts or other school supplies, excepting fuel and literary periodicals, in such amounts as may be authorized by the advisory board, in any year, he shall make an estimate of the kinds and amounts, itemized particularly, to be used by the bidders therefor. If it is necessary to make repairs on or about the school houses, other than current or incidental repairs, he shall likewise make an itemized statement of the nature and character of the work, to be made for the use of bidders. He shall, in like manner, make

a schedule of such work as may be necessary in the repair or construction of bridges in his township for any one year. All contracts shall be let, after notice given, by posting for three (3) weeks in five (5) of the most public places in the township, and also at or near the door of each postoffice therein, stating briefly the buildings, repairs or supplies sought to be let, and when and where bids will be received and opened therefor. * * * The Advisory Board shall attend the letting. At the letting all the work or supplies in any one class shall be included in a single contract. All bids shall be in writing, and opened and read publicly at the time and place fixed in the notice. The trustee may take time to examine and satisfy himself as to which is the lowest bid, and advise with the Advisory Board thereon, and said board is hereby empowered to reject any and all bids. * * *

Section 9601 Burns 1908, Acts 1899 p. 150, §11, provides that all contracts made in violation of this act shall be null and void.

Sections 6420-6422 Burns 1908, Acts 1901 p. 159, Acts 1901 p. 437, Acts 1907 p. 444, authorize the township trustee to abandon any district school in his township under the conditions therein set out.

Section 6423 Burns 1908, Acts 1907 p. 444, provides that "it shall be the duty of township trustees to provide for the education of such pupils as are affected by such or

1. *any former discontinuance in other schools*, and they shall provide and maintain means of transportation for all such pupils as live at a greater distance than two miles, and for all pupils between the ages of six (6) and twelve (12) years that live less than two miles and more than one mile from the schools to which they may be transferred, as a result of such discontinuance. Such transportation shall be in comfortable and safe conveyances. The drivers of such conveyances shall furnish the teams therefor, and shall use every care for the safety of the children

under their charge, and shall maintain discipline in such conveyances. Restrictions as to the use of public highways shall not apply to such conveyances. The expenses necessitated by the carrying into effect the provisions of this act shall be paid from the special school fund.” This section of the statute has been held to be remedial and administrative in character, and should be liberally construed. *Lyle v. State, ex rel.* (1909), 172 Ind. 502, 507, 88 N. E. 850.

Section 9598, *supra*, is a part of the county and township reform law. By this section the trustee is required, where

he desires to purchase school furniture, fixtures, maps,

2. charts or other supplies, excepting fuel and literary periodicals, authorized by the board, to make an itemized estimate to be used by bidders. It has also been held that contracts made in violation of this section of the reform act are absolutely void and cannot be enforced; that

persons doing business with a township trustee are

3. bound to take notice of the extent of his authority, and that his powers are only such as are expressly given by statute, or are necessarily implied, and that the authority of a township trustee will not be extended nor his powers enlarged, either by intendment or by any strained construction of the statute. §9601 Burns 1908, Acts 1899 p. 150, §11; *First Nat. Bank v. Adams School Tp.* (1897), 17 Ind. App. 375, 376, 46 N. E. 832; *First Nat. Bank v. Van Buren School Tp.* (1911), 47 Ind. App. 79, 93 N. E. 863, 866; *Oppenheimer v. Greencastle School Tp.* (1905), 164 Ind. 99, 103, 72 N. E. 1100; *Moss v. Sugar Ridge Tp.* (1903), 161 Ind. 417, 425, 68 N. E. 896.

It has also been held that a trustee must proceed in a manner provided by statute when he seeks to bind his township, otherwise his contracts are void, and no subse-

4. quent act can estop the township from setting up their invalidity. *Peck-Williamson, etc., Co. v. Steen School Tp.* (1903), 30 Ind. App. 637, 639, 66 N. E. 909;

Clinton School Tp. v. Lebanon Nat. Bank (1897), 18 Ind. App. 42, 45, 47 N. E. 349; *Lee v. York School Tp.* (1904), 163 Ind. 339, 340, 71 N. E. 956.

These cases, however, with many others, have been decided on the ground that the contracts involved were made in violation of an express statute. The question to

5. be first determined in the case at bar is whether §9598, *supra*, requires notice to be given before letting a contract for the transportation of children. As we read that section, it relates only to building or repairing schoolhouses, and furnishing school supplies, other than fuel and literary periodicals. There is no reference made to contracts for the transportation of children from districts where schools have been abandoned, and we do not think we are authorized to read into the section a provision which the legislature did not include.

Section 6423, *supra*, requires the trustee to provide for the education of children affected by the discontinuance of schools in the district in which they reside, and di-
6. rects that the trustee shall provide and maintain means of transportation for children residing certain distances from the school which they are required to attend.

The court found that an appropriation had been made for this purpose by the advisory board, and that at the time of making the contract in question the same had not been expended. The court also found that appellant in this case contracted to haul the children residing on a certain route for \$2 per day; that he was engaged in such service for a period of sixty-five days, and has received no compensation therefor.

Appellee directs our attention to the finding which shows that the children in this case were all under school age, and some of them unborn at the time the school in district number four was abandoned. It is, therefore, insisted that the trustee was not required by §6423, *supra*, to furnish trans-

portation for pupils who were not "transferred" when the school was abandoned. We think such an interpretation too narrow, and wholly at variance with the spirit of our public school system and the laws enacted for the administration of the same. Popular education has always been a matter of the highest concern to the State. Our fundamental law provides that "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the general assembly to encourage, by suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all." Constitution, Art. 8, §1.

The laws enacted in obedience to this constitutional mandate were passed and promulgated for the manifest purpose of putting children in school, and not for the purpose of keeping them out. Moreover, there could be no "transfer", as contemplated by §6449 Burns 1908, Acts 1901 p. 448, from a school district which has ceased to exist. A school district is not a geographical subdivision of a township, with definite and certain boundaries. It exists as an entity by virtue of the school. When the school is abandoned, the children of school age residing in the district become attached to another district by being enumerated therein. And where a child residing in a locality which was formerly a school district becomes of school age, and resides more than a mile or two miles, as the case may be, from the school in which the child is enumerated by reason of the abandonment of a school, such child is entitled, under §6423, *supra*, to transportation to and from the school which it is required to attend.

The trustee was compelled by law in this case to furnish such transportation, and there being no statute requiring notice to be given of the letting of the contract, such as was

made in the case at bar, the trustee was acting clearly within his powers, and the contract made by him was enforceable against the township.

The judgment is reversed, with instructions to the lower court to restate its conclusion of law, and render judgment thereon in favor of appellant for the amount found due.

NOTE.—Reported in 98 N. E. 440. See, also, under (1) 36 Cyc. 1173; (2) 38 Cyc. 636, 638; (3) 38 Cyc. 637; (4) 38 Cyc. 639; (5) 35 Cyc. 955; (6) 35 Cyc. 954, 957. For a discussion of the validity and construction of a statute, ordinance, etc., providing for the transportation of pupils to and from school, see Ann. Cas. 1912C 762. On the question of the right to use school money for transportation of pupils, see 38 L. R. A. (N. S.) 710. On the duty of the public to furnish free transportation to pupils, see 37 L. R. A. (N. S.) 1110.

CULLEN-FRIESTEDT COMPANY v. TURLEY.

[No. 7,441. Filed March 12, 1912. Rehearing denied May 17, 1912.]

1. **CONTRACTS.**—*Contract for Materials.—Part Performance.—Recovery.*—Where one enters into a special contract to furnish materials to another, and furnishes the same, though not in the time or manner stipulated in the contract, and the other party accepts and uses the same the party furnishing such material may recover the value thereof less the damages occasioned by his failure to comply with his contract. p. 472.
2. **CONTRACTS.**—*Contracts for Materials.—Part Performance.—Recovery on Quantum Meruit.*—Where one, having a special contract to furnish materials, is prevented from completing the contract by the other party, he may recover for the materials furnished on the *quantum meruit*, not to exceed the contract price. p. 472.
3. **CONTRACTS.**—*Action. — Counterclaim. — Damages. — Proof of Breach.*—In an action to recover for stone furnished defendant, though not furnished at the time and in the manner stipulated in the contract, defendant was required to show that there had been no breach of the contract on its part, in order to recover on a counterclaim for damages, for breach thereof by plaintiff. p. 473.
4. **CONTRACTS.**—*Contract for Materials.—Performance.—Breach.*—Where plaintiff's inability to comply with his contract to furnish stone to defendant in quantities up to 150 cubic yards per day was condoned by an arrangement whereby defendant was to bear

with plaintiff, and purchase stone needed in the open market, and when a time should come that defendant could not use as much stone as plaintiff could furnish, plaintiff was to bear with defendant, plaintiff, on thereafter being directed by defendant to ship no more stone until further orders, could not rely on such direction as constituting a breach of the contract, unless defendant failed for an unreasonable time to give such further orders. p. 473.

5. **CONTRACTS.—Contract for Materials.—Time of Payment.—Breach.—Recovery.**—Where, under a contract to furnish stone, timely payment of the amount due for monthly shipments was of the essence of the contract, defendant's failure to make such payments was a breach which absolved plaintiff from further performance on his part, and he was entitled to recover for the reasonable value of the stone furnished, less the damages suffered by defendant on account of his failure to furnish the full amount needed before the breach of the contract by defendant. p. 474.

6. **CONTRACTS.—Demand for Performance After Breach.**—Where the time of payment is of the essence of a contract, a party thereto while in arrears has no right to demand a performance by the other party. p. 474.

7. **CONTRACTS.—Contract for Materials.—Action for Reasonable Value.—Evidence.**—In an action for the reasonable value of stone sold pursuant to a contract, the contract price is in itself *prima facie* evidence of the value. p. 475.

From Washington Circuit Court; *Thomas B. Buskirk*, Judge.

Action by Oliver P. Turley against the Cullen-Friestedt Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Perry McCart, Elmer H. Adams, Dwight S. Bobb and Asa G. Adams, for appellant.

Will H. Talbott, M. B. Hottell, Shirts & Fertig, for appellee.

IBACH, P. J.—Appellee brought this action against appellant on a complaint in two paragraphs, the first on a written contract for the sale and delivery of certain stone, the second on a common count for stone delivered to and accepted by appellant, a bill of particulars of which was

filed with the complaint. Appellant filed a set-off, claiming damages amounting to \$11,857.68 for appellee's failure to perform the contract for the sale of stone.

The principal and controlling question is whether the evidence is sufficient to support the conclusion of law that appellee was entitled to recover the amount stated in a special finding of facts by the court.

The finding of facts shows that the parties entered into a written contract in the following words:

“I agree to furnish Cullen-Friestedt Company all the crushed stone necessary for the work of concreting the tunnel located between stations 1,028 and 1,051, and known as the Burton tunnel, on the Southern Railway Company's line between French Lick and Jasper, Indiana, said crushed stone to be to the satisfaction and acceptance of the engineers of said Southern Railway Company, and to be furnished in quantities as required by Cullen-Friestedt Company up to one hundred fifty cubic yards per day, at the following prices: Eighty-five cents per cubic yard of crushed stone, measured f. o. b. cars at quarry located east of Glass Rock, Indiana.

Payments to be made monthly by the Cullen-Friestedt Company, on the 20th of each month, for the stone furnished and accepted by the Southern Railway Company and used during the preceding month.

Oliver P. Turley,
Accepted Cullen-Friestedt Co.,
By F. J. Cullen.

Dated at French Lick, Indiana, this 27th day of May, 1907.”

The following facts are also found by the court: At the time the written contract was executed, plaintiff was the owner of an option for the purchase of a stone-quarry, not yet opened up, in which machinery for crushing had not been installed, nor a switch laid leading to a line of railway, which the defendant knew. The contract was made by the parties with these facts in view, defendant knowing that plaintiff intended to equip the quarry for the express purpose of carrying out the above contract. Plaintiff fitted up

his quarry, and on June 11, 1907, began shipping stone to defendant under said contract, and continued to ship stone to the amount of about sixty cubic yards a day until August 17, 1907, and on August 18, 1907, defendant ordered plaintiff, by telegram, not to ship any more stone until further orders. No further orders were given, and thereafter plaintiff shipped no more stone to defendant. He shipped between June 11 and August 18 in all 3,443.83 cubic yards to defendant, all of which was received and accepted by defendant under said contract, and was used by defendant in constructing the tunnel. The contract price for such stone was \$2,927.86, and such was its value. Soon after plaintiff began shipping stone, it became apparent to the parties that he would not be able to ship the stone as fast as defendant demanded, since proximity to the railroad track caused difficulty in working the quarry, and the parties agreed that plaintiff should do the best he could, and defendant might, in the meantime, go into the open market and purchase other stone until the situation of the quarry was such that plaintiff could meet defendant's requirements. Between the date of the first shipment and the sending of the telegram on August 18, defendant bought in the open market stone for which it paid in excess of the contract price \$541.68. At the time the telegram was sent, to ship no more stone until further orders, defendant had its bins at the tunnel full of crushed stone, and had eighteen carloads on its side-track, which plaintiff had shipped and defendant had received, and plaintiff was then furnishing and was able to furnish 150 yards per day. On June 25, 1907, plaintiff rendered defendant an itemized statement for stone shipped under said contract to date, and defendant paid this bill on August 2, 1907, as corrected for a slight mistake in amount, without making any claim against plaintiff for breach of contract. On July 25, 1907, plaintiff rendered an itemized statement of stone shipped from June 25, and on August 26 a statement for stone shipped after July 25, but defendant

failed to pay these bills, and on September 9, 1907, plaintiff notified defendant that he could not make any further shipments of stone until such payment was made. There is due plaintiff \$16.10 for hauling concrete machinery, at request of defendant, which labor was worth that sum. After allowing defendant credit for said sum paid by it on account of stone purchased in the open market in excess of the contract price, and for payment of the first bill, there is due plaintiff for stone furnished under such contract and not paid for, the sum of \$1,788.20, with interest from August 25, 1907, and \$16.10 for hauling machinery, plaintiff being entitled to recover in all the sum of \$1,857.94.

Every statement in the finding of fact is supported by some evidence.

It is practically conceded by appellee that the proof did not substantiate the allegations of the first paragraph of complaint, and that if the judgment is upheld, it must be on the second paragraph, or common count.

Where one enters into a special contract to furnish materials to another, and furnishes the same, though not in the time or manner stipulated in the contract, and the

1. other party accepts and uses it, the latter is liable to the amount of his benefit thereby, upon an implied promise to pay for value received. *Ricks v. Yates* (1854), 5 Ind. 115; *Wheatly v. Miscal* (1854), 5 Ind. 142; *Persons v. McKibben* (1854), 5 Ind. 261, 61 Am. Dec. 85; *Wolcott v. Yeager* (1858), 11 Ind. 84; *Adams v. Cosby* (1874), 48 Ind. 153; *Everroad v. Schwartzkopf* (1890), 123 Ind. 35, 23 N. E. 969; *Cleveland, etc., R. Co. v. Scott* (1907), 39 Ind. App. 420, 79 N. E. 226. That is, the one furnishing the materials can recover for the value of his materials less the damages occasioned by his failure to complete his contract.

2. But if he is prevented from completing the contract by the other party, he may recover for the materials furnished on the *quantum meruit*, not to exceed the contract price. *French v. Cunningham* (1898), 149 Ind. 632, 49 N.

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E. 797. Appellant's counterclaim was in the nature
3. of a complaint against appellee for damages for breaking the contract, and in order to be able to recover on this counterclaim, it must show that there had been no breach of the contract on its part. *Branham v. Johnson* (1878), 62 Ind. 259; *Skehan v. Rummel* (1890), 124 Ind. 347, 24 N. E. 1089; *Ohio Valley Buggy Co. v. Anderson Forging Co.* (1907), 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045.

Appellant contends that appellee broke his contract, that he failed to furnish as much stone as appellant required him to under the contract, and that on September 9, 1907,
4. he was ordered to furnish more stone, which he refused to do; that appellant was greatly damaged by refusal, and that appellee cannot recover on the common count without paying to appellant the damages occasioned by his failure to perform his contract. Appellee's contention is that appellant broke the contract. He urges that appellee's failure at first to furnish as much stone as appellant required was condoned by an arrangement made whereby appellant was to bear with appellee, and purchase stone needed in the open market, and when a time should come that appellant could not use as much stone as appellee could furnish, appellee was to bear with appellant. That such an arrangement was made is supported by the evidence. Appellee further contends that the contract was broken by appellant's telegram directing appellee to ship no more stone until further orders. We do not think so. The contract was for the shipment of stone in quantities up to 150 cubic yards per day, and appellant could fix the amount at anything below 150 cubic yards. Appellant had borne with appellee when he could not furnish all the stone required, in conformity with the arrangement between them, and as his part of the agreement, appellee was called on to bear with appellant when appellant could not use all the stone he could furnish. The use of the words "further notice" in the telegram would

imply an intention to give further notice and demand more stone. However, after sending the telegram above mentioned, if appellant did not give further notice within a reasonable time, such failure on its part would be a breach of the contract, for appellee could not be expected to hold himself in readiness to perform indefinitely, or for an unreasonable time. There is a conflict as to whether appellant made a demand on appellee to ship more stone. Appellant's witnesses testify that such a demand was made on September 9. Appellee testifies that appellant did not demand more stone, but qualifies this statement by saying that on September 9 appellant's officers did tell him they were ready for stone. He also testifies that he told them he would ship them more stone if they would pay for what they had had. We need not decide whether the statement of appellant's officers, to the effect that they were ready for stone, could be construed to be a demand, since appellant, according to the undisputed evidence, failed to pay appellee for the stone fur-

5. nished under the contract at the time specified by that contract. We cannot construe the contract otherwise than that timely payment of the amount due appellee on monthly shipments was of the essence of the contract, and failure to make such payments was a breach on appellant's part which absolved appellee from further performance on his part. *Skehan v. Rummel, supra*; *Ohio Valley Buggy Co. v. Anderson Forging Co., supra*. Appellant having failed to make payments as required by the contract, appellee had a right to consider the contract broken, and to refuse to furnish more stone unless paid for that furnished, as he did, and to recover in this action for the reasonable value of the stone furnished, less the damages suffered by appellant on account of appellee's failure to supply the full amount needed before breach of the contract by appellant.

6. Appellant had no right to demand performance on appellee's part while itself in arrears. On this theory the court rendered judgment, and there is evidence support-

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ing the judgment. It is contended that there is no evidence that the stone was worth the price allowed by the court, which was the contract price, but we think the evidence on this point is sufficient, since the contract itself is *prima facie* evidence of the value of the stone (*Wolcott v. Yeager, supra*), and since it is unquestioned that stone of similar quality purchased elsewhere cost appellant much more than the contract price.

Judgment affirmed. Hottel, J., not participating.

NOTE.—Reported in 97 N. E. 946. See, also, under (1) 9 Cyc. 686; (2) 9 Cyc. 688; (3) 9 Cyc. 759; (4) 9 Cyc. 636, 646; (5) 9 Cyc. 642; (6) 9 Cyc. 603; (7) 40 Cyc. 2849. For authorities on the question of rescission for failure to pay for installment as delivered, see 32 L. R. A. (N. S.) 1. As to the rescission of a contract for the successive deliveries of goods on account of the nonpayment of an installment, see 3 Ann. Cas. 901. As to *quantum meruit* on substantial performance of a building contract, see 134 Am. St. 678. As to acceptance of work as waiver of imperfect performance, see 115 Am. St. 256. As to the rights and remedies generally of a seller on the buyer's breach of contract, see 133 Am. St. 563.

AMERICAN SURETY COMPANY OF NEW YORK v. STATE OF INDIANA, EX REL. SOUERS ET AL.

[No. 7,624. Filed May 28, 1912.]

1. PLEADING.—*Plea in Abatement*.—*Requirements*.—To be sufficient a plea in abatement must contain the utmost fullness and particularity of statement, so that there is nothing to be supplied by intendment or construction and so as to leave no supposable special answer unobviated. p. 480.
2. PLEADING.—*Plea in Abatement*.—*Sufficiency*.—*Another Action Pending*.—A plea in abatement on the ground of another action pending must show clearly that the action pending is for the identical cause of action as that involved in the cause which is sought to be abated, and that it is between the same parties or their privies. p. 481.
3. INTOXICATING LIQUORS.—*Unlawful Sales*.—*Sales by Different Persons*.—*Joint or Separate Liability*.—*Right to Maintain Separate Concurrent Actions*.—The basis of an action on the bond of a saloon-keeper sounds in tort, so that where unlawful sales of

intoxicating liquor, made by different saloon keepers, result in a single cause of action, the wrongdoers may be proceeded against either jointly or separately, and where separate actions are brought, the same may be prosecuted concurrently until judgment, but one satisfaction will bar further proceedings in the other actions. p. 481.

4. **INTOXICATING LIQUORS.—Unlawful Sales.—Action for Damages.—Plea in Abatement.—Sufficiency.—Another Action Pending.—Answer in Bar.**—In an action brought on the relation of a wife and children against the surety on a saloon-keeper's bond to recover for injury to their means of support resulting from an unlawful sale of liquor, the liability of such surety is grounded in the saloon-keeper's liability as principal, so that a plea in abatement by the defendant surety was insufficient which alleged that such wife had instituted an action on a similar bond executed by another saloon-keeper with the defendant surety as surety thereon, and in which plaintiff alleged the same grounds for recovery as alleged in the action in which such plea was filed, and which action was pending at the time the latter cause came up for trial, and the demurrer to such plea and also a demurrer to a paragraph of answer presenting the same facts as matter in bar of the action were properly sustained. p. 481.
5. **INTOXICATING LIQUORS.—Unlawful Sales.—Action for Damages.—Right to Maintain Action.—Effect of Election Under Local Option Law.**—Under the provisions of §243 Burns 1908, §243 R. S. 1881, that no vested rights, or suits instituted, under existing laws shall be affected by the repeal thereof, and under §248 Burns 1908, §248 R. S. 1881, providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder unless the repealing act shall expressly so provide, a right to maintain an action on the bond of a saloon-keeper under the provisions of §8355 Burns 1908, §5323 R. S. 1881, for the unlawful sale of liquor resulting in injury to plaintiffs' means of support, is not affected by the fact that in the county in which the action accrued an election was subsequently held under the provisions of the county local option law (Acts 1908 [s. s.] p. 4) and resulted in prohibiting the sale of intoxicating liquors, even if said act could be construed as repealing the act of 1875 of which §8355 Burns 1908, §5323 R. S. 1881, is a part. p. 481.
6. **TRIAL.—Answers to Interrogatories.—Conflict.**—Where answers to interrogatories favorable to the unsuccessful party are in conflict with other answers adverse to his contention, they will not support a motion for judgment thereon. p. 484.
7. **INTOXICATING LIQUORS.—Unlawful Sale.—Action for Damages.—Evidence.—Admissibility.**—In an action brought under the pro-

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visions of §8355 Burns 1908, §5323 R. S. 1881, on the bond of a saloon-keeper, for injury to plaintiffs' means of support by the unlawful sale of liquor to the husband and father of the plaintiffs, he having been imprisoned for a homicide alleged to have been committed while intoxicated, evidence of his threat to kill the decedent before morning was properly admitted in behalf of plaintiffs on the question of his intoxication, although such threat was made out of the presence of the defendants, and although he had stated, while testifying as a witness for plaintiffs, that the killing was in self-defense. pp. 485, 486.

8. INTOXICATING LIQUORS.—*Unlawful Sale.—Injury to Means of Support.—Direct or Remote Results.*—The injury or damage to means of support, for which an action lies under §8355 Burns 1908, §5323 R. S. 1881, in favor of one injured in means of support by the unlawful sale of intoxicating liquor, may be the direct or remote result of such unlawful sale. p. 486.

9. APPEAL.—*Trial.—Discretion of Trial Court.—Order of Proof.*—The order of the admission of evidence is ordinarily a matter within the sound discretion of the trial court, and will furnish no ground for reversal unless there has been a clear abuse of such discretion. p. 488.

10. APPEAL.—*Harmless Error.—Exclusion of Evidence.*—No available error is presented on the exclusion of evidence where the record shows that the witness afterwards answered the question excluded. p. 488.

11. INTOXICATING LIQUORS.—*Unlawful Sales.—Action for Damages.—Evidence.—Admissibility.—Pendency of Other Actions.*—In the trial of an action on the bond of a saloon-keeper for injury to the means of support of a wife and children caused by the unlawful sale of liquor, evidence that the wife had filed other actions against other saloon-keepers was properly excluded. p. 489.

12. INTOXICATING LIQUORS.—*Unlawful Sales.—Action for Damages.—Instructions.*—In an action on the bond of a saloon-keeper under §8355 Burns 1908, §5323 R. S. 1881, for injury to means of support resulting from the unlawful sale of liquor, where the husband and father of the plaintiffs was imprisoned for homicide alleged to have been committed while he was intoxicated, and the defense was that the killing was in self-defense and not the result of such unlawful sale of liquor, it was proper to instruct the jury that if self-defense and the use of the intoxicating liquors unlawfully sold combined as causes impelling the killing and each operated to a material degree in bringing it about, then, if the other facts necessary to a recovery by plaintiffs are established by a fair preponderance of the evidence, plaintiffs are not precluded from recovering simply because self-defense constituted one of the causes of the homicide. p. 489.

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13. **INTOXICATING LIQUORS.—Unlawful Sale.—Action for Damages.**
—*Instructions.*—In an action on the bond of a saloon-keeper for injury to means of support resulting from the unlawful sale of intoxicating liquor, where the husband and father of plaintiffs had been imprisoned for homicide, an instruction that if plaintiffs' husband and father acted solely in self-defense, and that the liquor sold him did not contribute toward causing the homicide, the verdict should be for the defendant, but that the question as to whether the use of liquors sold, if any such sale was made, contributed toward causing the homicide, was for the jury to determine from all the evidence, and that any claims by the husband and father of plaintiffs that he had acted in self-defense would not necessarily preclude a finding for the plaintiffs, was not erroneous in failing to require a finding that the sale of liquor was unlawful, where that element was submitted in another instruction, nor was the instruction improper in referring to the claims of self-defense as "claims" and not as evidence. p. 489.
14. **INTOXICATING LIQUORS.—Unlawful Sale.—Action for Damages.**
—*Instructions.—Refusal.*—In an action on the bond of a saloon-keeper for damages resulting from the unlawful sale of intoxicating liquor, where the evidence was that the sale was not made by the saloon-keeper, but by his bartender, an instruction was properly refused which stated that before any recovery could be had by the plaintiffs, it must be shown by a fair preponderance of the evidence that the defendant saloon-keeper sold the intoxicating liquors. p. 491.
15. **INTOXICATING LIQUORS.—Unlawful Sales.—Liability.—Sales by Employee of Saloon-keeper.**—In cases of injury resulting from the unlawful sale of intoxicating liquors, a liability exists on the bond of the saloon-keeper although the sale may not have been made by him in person, but by some one authorized to make sales and conduct the business generally. p. 491.
16. **INTOXICATING LIQUORS.—Unlawful Sales.—Action for Damages.**
—*Instructions.—Refusal.*—Where in an action on the bond of a saloon-keeper for injury to means of support resulting from an unlawful sale of liquor to the husband and father of plaintiffs, he having been imprisoned for a homicide alleged to have been committed while he was intoxicated, it was claimed that the homicide was committed in self-defense and not as the result of such sale of liquor, an instruction was properly refused which attempted to define the law of self-defense, but which omitted the element requiring a person, who invokes its aid to acquit himself of the charge of murder, to be himself without fault. p. 491.
17. **INTOXICATING LIQUORS.—Unlawful Sales.—Action for Damages.**
—*Instructions.—Issues.*—In an action on the bond of a saloon-

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keeper for damages resulting from the unlawful sale of liquor, where no issue was tendered denying the execution of the bond, an instruction that proof of such execution was necessary to a recovery by plaintiffs was properly refused. p. 491.

18. *APPEAL.—Review.—Harmless Error.—Refusal to Submit Interrogatories.*—The refusal to submit certain interrogatories is not prejudicial error, where in the main such interrogatories called for items of evidence, or related to collateral or immaterial matters, although some of them might have been properly submitted. p. 492.

19. *APPEAL.—Presenting Question for Review.—Motion for New Trial.—Interrogatory Not Sustained by Sufficient Evidence.*—No question is presented by a motion for a new trial on the ground that a certain interrogatory is not sustained by sufficient evidence. p. 492.

20. *APPEAL.—Review.—Verdict.—Sufficiency of Evidence.*—A cause will not be reversed for insufficiency of the evidence to sustain the verdict, where there was some evidence to warrant the finding of the jury. p. 492.

From Whitley Circuit Court; *Luke H. Wrigley*, Judge.

Action by the State of Indiana on the relation of Retta Souers and others against the American Surety Company of New York. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Gates & Whiteleather, Watkins & Butler, for appellant.

John S. Branyan, W. F. McNagny, Lesh & Lesh, for appellees.

HOTTEL, C. J.—Appellee Retta Souers is the wife, and the other appellees are the children of Thomas Souers, and this action was brought by the State, with said appellees as relators, to recover on a saloon-keeper's bond, executed by John S. Brown as principal and appellant as surety.

The action is based on §8355 Burns 1908, §5323 R. S. 1881, and the breach or violation of duty by the principal of the bond relied on, as creating the liability alleged in the complaint, is the unlawful sale of liquor to said Thomas Souers at a time when he was intoxicated, resulting in a loss to the relators of their means of support.

A trial by jury resulted in a verdict for appellees in the sum of \$1,500.

The complaint avers, in substance, that, as a result of said unlawful sale to said Souers, when he was in said intoxicated condition, he became so extremely intoxicated that he was irritable, crazed and frenzied, and while in such condition engaged in a quarrel with Benjamin Thomas, and shot and killed him; that on account of such killing said Souers was indicted, tried, convicted and sent to the state prison, and that the relators were thus deprived of their means of support.

It is conceded by appellant that the complaint follows that of *Homire v. Halfman* (1901), 156 Ind. 470, 60 N. E. 154, and as no objection to its sufficiency is urged, we need give it no further notice.

The first question presented by this appeal is the alleged error of the trial court in sustaining a demurrer to appellant's first plea in abatement. The substance of this plea is that at the time appellees commenced this action, appellee Retta Souers filed a suit on a similar bond executed by another saloon-keeper, viz., Harvey Gill, as principal, and appellant as surety thereon, and therein alleged the same grounds for recovery which form the basis of the complaint at bar; that said suit was venued to the Wells Circuit Court, and was there pending at the time this cause came up for trial.

A plea in abatement to be sufficient must contain "the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving, on
1. the one hand, nothing to be supplied by intendment or construction; and on the other, no supposable special answer unobviated." *Needham v. Wright* (1895), 140 Ind. 190, 193, 194, 39 N. E. 510. See, also, *Board, etc., v. Lafayette, etc., R. Co.* (1875), 50 Ind. 85, 117; *Kelley v. State* (1876), 53 Ind. 311, 312; 1 Am. and Eng. Ency. Law 11 and notes; *Lechner v. Strauss* (1912), ante 414, 98 N. E. 444.

When such plea is based on the ground of another action,

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it must show clearly that the suit pending is for the identical cause of action as that involved in the cause which

2. is sought to be abated, and that it is between the same parties or their privies. *Needham v. Wright, supra*; *Bryan v. Scholl* (1887), 109 Ind. 367, 10 N. E. 107; *Praxton v. Vincennes Mfg. Co.* (1898), 20 Ind. App. 253, 50 N. E. 583.

Although this is a suit on a bond, the basis of the action sounds in tort, and appellees were entitled to proceed against all the wrongdoers, either jointly or separately, and

3. where separate actions are brought, the same may be prosecuted concurrently until judgment has been reached, but one satisfaction is a bar to further proceedings on the same cause of action. *Cleveland, etc., R. Co. v. Gossett* (1909), 172 Ind. 525, 535, 87 N. E. 723; *Cleveland, etc., R. Co. v. Hilligoss* (1908), 171 Ind. 417, 423, 86 N. E. 485, 131 Am. St. 258; *Indianapolis Traction, etc., Co. v. Holtzclaw* (1907), 40 Ind. App. 311, 81 N. E. 1084.

Appellant's liability as surety is grounded in Brown's liability as principal, and the case at bar is prosecuted by additional plaintiffs on a different bond, and is based on a

4. different sale of liquor made at a different time and place from that of the action against Gill. The Gill action could not, therefore, serve to abate the present action as to either Brown or appellant.

For the reasons indicated, the demurrer to the first plea in abatement was properly sustained, as was also the demurrer to appellant's third paragraph of answer, which presented the same defense as a bar to this action.

A second plea in abatement was filed by appellant, the substance of the averments of which, in brief, was that subsequent to the occurrence of the matters alleged in ap-

5. pellees' complaint, the voters of Huntington county, at a special election under the county local option law (Acts 1908 [s. s.] p. 4), voted to prohibit the sale of intoxica-

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ting liquors as a beverage in said county; “that by reason of such election and by reason of the act of said special session of 1908 of the General Assembly, the former law of this State regarding the regulating and issuing of licenses * * * was repealed and the said act of the special session of 1908 contained no clause saving pending litigation or providing for a continuance of the act of 1875 * * * for any purpose whatever.”

The ruling of the court below in sustaining a demurrer to this plea presents the second error relied on.

Appellant urges that the local option law of 1908, *supra*, repealed or suspended the act of 1875 (Acts 1875 [s. s.] p. 55, §8355 Burns 1908), under which the bond sued on was issued, and that any suit based on said bond would abate because of the repeal or suspension of the law.

Section 12 of said act of 1908 provides: “Nothing contained in the provisions of this act shall affect, amend, repeal or alter in any way the act entitled ‘An act to better regulate and restrict the sale of intoxicating, * * * liquors,’

* * * approved March 11, 1895, nor the act to amend section nine of the above mentioned act approved February 15, 1905, nor of any law or ordinance which prohibits throughout any township, ward or any residence district the sale of intoxicating liquors, but this act shall be deemed additional and supplemental thereto.” Although this §12 does not expressly mention the act of 1875 as among the acts expressly saved from repeal yet the closing language of said section indicates that the intention of the legislature was that the act of 1908 should be additional and supplemental to the existing law on the same subject.

But assuming, without deciding, that the act of 1908, *supra*, had the effect of repealing the act of 1875, *supra*, it in noway deprived appellees of their right to maintain this action.

Section 248 Burns 1908, §248 R. S. 1881, provides that “the repeal of any statute shall not have the effect to release

or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.”

Appellant relies on the case of *Taylor v. Strayer* (1906), 167 Ind. 23, 78 N. E. 236, 119 Am. St. 469, to take this action out of the operation of the section of statute last quoted. That case involved the establishment of a drain, and while the cause was pending in the lower court, the General Assembly passed a new drainage law, and repealed all prior drainage statutes. On appeal, counsel for appellees attempted to invoke the saving provisions of the statute above quoted, but the Supreme Court said, at page 30: “It is manifest that §248, *supra* [§248 Burns 1901, 248 R. S. 1881], has no application to any feature of this case, *but only relates to penalties, forfeitures and kindred liabilities.*” (Our italics.)

In this connection we may remark that, for the purpose of this appeal, appellant is in no position to insist that the “*liability*” on the bond herein sued on is not akin to a “*penalty*,” because a large portion of one of the pages of its brief is taken up with propositions and authorities cited to the effect that the recovery which the statute authorizes in cases of this kind is penal in character.

Again §243 Burns 1908, §243 R. S. 1881, provides: “No rights vested, or suits instituted, under existing laws shall be affected by the repeal thereof, but all such rights may be asserted, and such suits prosecuted, as if such laws had not been repealed.”

This is a suit on a bond. The condition of the bond, for the breach or violation of which the action was brought, is charged to have been broken at a time previous to the enactment of the local option law of 1908, and the liability for such breach had therefore accrued before the passage of such

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act, and would not, under the provisions of the sections of the statute, *supra*, and the authorities construing the same, be affected by such act. *State, ex rel., v. Helms* (1893), 136 Ind. 122, 35 N. E. 893; *Hochstettler v. Mosier Coal, etc., Co.* (1893), 8 Ind. App. 442, 35 N. E. 927; *State, ex rel., v. Halter* (1898), 149 Ind. 292, 300, 302, 47 N. E. 665, 49 N. E. 7; *Starr v. State, ex rel.* (1898), 149 Ind. 592, 594, 595, 49 N. E. 591; *City of Indianapolis v. Ritzinger* (1900), 24 Ind. App. 65, 77, 56 N. E. 141.

The sections of statute and authorities cited justified the ruling of the court below on the demurrer to the second plea in abatement, and to the second paragraph of answer which raised the same question.

With its general verdict the jury returned answers to interrogatories, and a motion was made by appellant for judgment thereon, which was by the court overruled. This ruling presents another alleged error relied on and urged by appellant.

The jury in its said answers found that when Thomas Souers reached Troy City, where the shooting occurred, he went to a store to return a borrowed overcoat; that there was no evidence that he went to said store for any other purpose, and that he did not know that Benjamin Thomas was in the store when he entered it to return the borrowed overcoat. Other interrogatories show some of the details of the quarrel and shooting, but in answer to the twenty-ninth interrogatory, the jury expressly found that Souers did not shoot and kill Thomas in self-defense.

In so far as the answers to the interrogatories are favorable to appellant, they are in conflict with other answers adverse to its contention, and their effect is thereby

6. nullified, and will not, therefore, support a motion for judgment thereon. *Fitzmaurice v. Puterbaugh* (1897), 17 Ind. App. 318, 45 N. E. 524; *Davis v. Reamer* (1886), 105 Ind. 318, 4 N. E. 857; *Shuck v. State, ex rel.* (1893), 136 Ind. 63, 35 N. E. 993.

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The admission of certain evidence is urged as ground for reversal. One of appellees' witnesses was asked the following question: "You may tell the jury whether 7. or not he (referring to Souers) was making any threats against Benjamin F. Thomas," to which the witness answered, over appellant's objection: "Yes, sir. He said he would kill him before morning. He bet \$20 he would kill him before morning." It is earnestly insisted by appellant that this statement being made out of the presence of the principal and surety on the bond, they should not be bound thereby, and that, inasmuch as appellees' own witness, Souers, had testified that he did the shooting in self-defense, it was an effort to impeach such witness without laying the foundation therefor. Appellees, upon the other hand, insist that the evidence was proper to go to the jury as one of the facts showing that Souers was intoxicated, and on which the witness based his opinion so given to the jury.

The answer was not responsive to the question asked. The question asked simply called for a "yes" or "no" answer as to whether Souers was making any threats against Thomas, and did not ask for a statement of what the threats were. The objection made to the question was that "the defendants and neither of them are bound by the statement made to another witness in their absence." There was no objection to the answer, and no motion to strike it out as not being responsive to the question. It is questionable, therefore, whether this ground of the motion for new trial is presented by the record. *Continental Casualty Co. v. Lloyd* (1905), 165 Ind. 52, 65, 73 N. E. 824; *Vickery v. McCormick* (1889), 117 Ind. 594, 596, 20 N. E. 495.

But, assuming that the question is properly presented, we are of the opinion that no error was committed in admitting the evidence.

This court in the case of *Berkemeier v. State, ex rel.*, (1909), 44 Ind. App. 1, 6, 88 N. E. 634, 636 said: "Three

acts are necessary to establish this cause of action: (1) The sale or gift of the liquor by the appellants; (2) intoxication resulting from its use, in whole or in part; (3) the loss of the means of support by the relators in consequence of such intoxication.”

It would seem that this evidence was admissible as tending to prove the second element, *supra*, of the cause of action, but even if it were not admissible for such purpose, we think it was proper as affecting the third element.

The section of the statute on which the action is based makes the damages to be recovered depend on the injury to the plaintiffs' means of support. *Berkemeier v. State, ex rel., supra*; *American Surety Co. v. State, ex rel.* (1910), 46 Ind. App. 126, 90 N. E. 99, 91 N. E. 624; *Nelson v. State, ex rel.* (1903), 32 Ind. App. 88, 90, 69 N. E. 298; *Homire v. Halfman* (1901), 156 Ind. 470, 474, 60 N. E. 154.

This injury or damage may be the direct or remote result of such unlawful sale. *U. S. Fidelity, etc., Co. v. State, ex rel.* (1910), 46 Ind. App. 373, 92 N. E. 691, 692;

8. *State, ex rel., v. Terheide* (1906), 166 Ind. 689, 693, 78 N. E. 195; *Mulcahey v. Givens* (1888), 115 Ind. 286, 17 N. E. 598; *Homire v. Halfmdn, supra*; *Nelson v. State, ex rel., supra*; *McCarty v. State, ex rel.* (1904), 162 Ind. 218, 222, 70 N. E. 131; *State, ex rel., v. Dudley* (1910), 45 Ind. App. 674, 91 N. E. 605, 606.

In this case the direct cause of the injury to appellees' means of support was the imprisonment of Souers, the husband and father. Such imprisonment was the direct

7. result of the crime, with the commission of which he was found guilty. Whether such imprisonment, with the resulting loss to appellees of their means of support, was the remote result of the unlawful sale of intoxicating liquors to Souers, therefore, necessarily depended on whether the crime for which Souers was convicted was the direct result of such unlawful sale. If the evidence be of a

character to show that such unlawful sale in fact caused Souers to commit the crime for which he was imprisoned, then the causal connection between such sale and the imprisonment as the remote result would be shown, and appellees would be entitled to recover. If, on the other hand, the evidence showed that some influence other than the effect of the liquor induced the killing, and that the unlawful sale of the liquor had nothing to do with the same, then there would be a failure to show any causal connection, and appellees would fail in their action.

Applying these observations to this case, the importance and competency of the evidence objected to, we think, becomes apparent. Appellant-defended this action on the theory that Souers killed Thomas in self-defense, uninfluenced by the effect of any liquor sold to him. The court below, properly, we think, allowed this proof, and allowed appellant to go behind the judgment of conviction, which was *prima facie* evidence that the killing was not in self-defense. Souers himself testified that he did the shooting in self-defense. If this evidence of self-defense, was proper, and appellant is insisting that it was, then we think it follows necessarily that the admitted evidence of which complaint was made was proper as tending to rebut such theory. This evidence was clearly admissible in the trial of the criminal case for the purpose of showing intent, malice, motive or disposition and frame of mind on the part of Souers in the commission of the crime for which he was imprisoned, and which resulted in the loss of the support herein sued for. *Parker v. State* (1894), 136 Ind. 284, 286, 35 N. E. 1105; *Wheeler v. State* (1902), 158 Ind. 687, 698, 63 N. E. 975; *Reed v. State* (1850), 2 Ind. 438; *State v. Brown* (1905), 188 Mo. 451, 87 S. W. 519; *Glass v. State* (1906), 147 Ala. 50, 55, 41 South. 727.

This evidence being proper and competent to go to the jury trying the criminal cause for its consideration in determining whether Souers in fact acted in self-defense when he

shot decedent, or whether he was guilty as charged, it follows, necessarily, that the jury trying the civil action, for the purpose of determining whether the imprisonment is the remote cause of such unlawful sale, should have before it the same evidence affecting said question.

There was no objection to the offered evidence on the ground that it was not admissible as evidence for appellees in their case in chief, and in any event the order of

9. the admission of evidence is ordinarily a matter within the sound discretion of the trial court, and will furnish no ground for reversal, unless there has been a clear abuse of such discretion. *Louisville Underwriters v. Durland* (1890), 123 Ind. 544, 552, 24 N. E. 221, 7 L. R. A. 399; *Miller v. Coulter* (1901), 156 Ind. 290, 294, 59 N. E. 853.

The exclusion of certain evidence is also urged as error. The witness Souers at the trial on cross-examination by appellant testified that he had claimed that he shot

10. Thomas in self-defense, and answered further that he was "scared and drunk".

The deposition of Souers had been taken while he was in the penitentiary, and appellant asked the witness, in substance, if he had not stated in his deposition that he was scared and thought he (Thomas) was very drunk himself, and might kill him. An objection to this question was sustained. The only part of the answer of the witness in his deposition which could be said to contradict and impeach his testimony given at the trial was that part of the same which attributed his fear of danger to *Thomas's being drunk*, while at the trial his statement was that *he, the witness, was drunk*.

The record discloses that the witness afterwards answered this part of the question. No available error on this question is therefore presented by the record.

The refusal to permit appellant to prove by appellee Retta Souers, on cross-examination, that she had filed suits

against other saloon-keepers is also urged as error.

11. For the reasons already expressed in holding the answers tendering such defense insufficient, we think this evidence was properly excluded.

Alleged error in giving certain instructions is next urged by appellant. Among the instructions objected to are the fifth and sixth given by the court. The fifth instruc-

12. tion enumerates all the elements necessary to entitle appellees to recover under the authorities herein cited. In fact, appellant makes no objection to this part of the instruction, but its objection goes to the concluding part of the same, which is as follows: "If self-defense on the part of Souers and the use by him of intoxicating liquors illegally sold to Souers by Brown or his agent, combined as causes impelling Souers to kill Thomas, and each of these things operated to a material degree towards bringing about such killing, then, if the other facts necessary to a recovery by the plaintiff, are established by a fair preponderance of the evidence, the plaintiff will not be precluded from recovering simply because self-defense constituted one of the causes bringing about the killing of Thomas."

A saloon-keeper who sells intoxicating liquors in violation of §8355 Burns 1908, §5323 R. S. 1881, is, under the authorities hereinbefore cited, liable personally and on his bond to those injured in their means of support for all damages caused directly or remotely by such sales.

In view of the theory of defense, and the evidence in this case, we think the instruction given was proper and as favorable to appellant as such authorities warrant.

The part of the sixth instruction necessary to an understanding of appellant's objections thereto is as follows:

13. "If Souers, in killing Thomas, acted solely in self-defense, and the use of liquor, sold to Souers by Brown or his agent, did not contribute towards causing Souers to kill Thomas, then you should find for the defendants. But the question as to whether or not the use

of liquors, sold to Souers by Brown or his agent, if any such sale was made, contributed toward causing Souers to kill Thomas, is a question of fact for you to determine from all the evidence in the cause, and the facts, if such be the facts, that Souers claims to have acted in self-defense in killing Thomas, or that Souers at the time of such killing, believed that Thomas was about to do him great bodily harm, do not of themselves, necessarily preclude a finding on your part in favor of the plaintiff on this branch of the case. Neither does the fact, that Souers, for the killing of Thomas, was convicted of felonious homicide necessarily preclude you from finding in this case, if you think such finding justified by the evidence, that Souers acted solely in self-defense in killing Thomas.”

It is urged against this instruction that it omits the element that the sale of liquor must have been unlawful, and that it treats the “claims of Souers as claims”, not as evidence, and assumes that if the killing were justified from the evidence the defendant would still be liable for the miscarriage of justice and the wrong suffered by Souers from his conviction.

In answer to the first objection it is sufficient to say that the instruction does not attempt to state the entire law of the case, but only the law applicable to one branch thereof. The evidence of Souers was that he claimed to have acted in self-defense, and the court in the instruction gave appellant the benefit of such claim.

We think the instruction is not open to the objections urged against it.

No sufficient ground of objection is pointed out to the other instructions given.

The refusal to give certain instructions which it tendered is next urged by appellant, viz., error in refusing to give the second, fourth and fifth.

It is conceded that the court “attempted” to cover the second instruction in the court’s sixth instruction. This

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second instruction was properly refused in any
14. event, because it told the jury that before any recovery could be had by the appellees, “it must be shown by a fair preponderance of the evidence that the defendant *Brown* sold intoxicating liquors” to Souers, etc.

The evidence was that the sale was made not by Brown but by his bartender. In cases of this character liability exists although the unlawful sales may not have been
15. made by the saloon-keeper in person, but by some one authorized to make sales and conduct the business generally. *Nelson v. State, ex rel., supra*, 92; *Voss v. State, ex rel.* (1894), 9 Ind. App. 294, 36 N. E. 654; *Reath v. State, ex rel.* (1896), 16 Ind. App. 146, 44 N. E. 808; *State, ex rel., v. Terheide, supra*, 693; *Berkemeier v. State, ex rel., supra*; *Keedy v. Howe* (1874), 72 Ill. 133; *Black, Intox. Liquors* §298; *Peterson v. Knoble* (1874), 35 Wis. 80.

Though it be conceded that in law the acts of the agent are the acts of the principal, yet under the evidence in this case, the instruction as tendered would have been necessarily misleading and harmful to appellees.

The fourth instruction tendered undertook to define the law of self-defense, and omitted the essential element requiring the person who invokes its aid, to acquit
16. himself of the charge of murder, to be himself without fault, and was, therefore, properly refused. *Story v. State* (1885), 99 Ind. 413; *Smurr v. State* (1886), 105 Ind. 125, 4 N. E. 445; *Deal v. State* (1895), 140 Ind. 354, 362, 39 N. E. 930; *Deilks v. State* (1895), 141 Ind. 23, 26, 40 N. E. 120.

There was no issue tendered denying the execution of the bond, and the fifth instruction tendered by appellant,
17. which necessitated such proof to justify recovery, was for this and other reasons properly refused.

The refusal to submit certain interrogatories is next urged.

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Concerning this alleged error, it is sufficient to say that in the main the interrogatories refused called for items of evidence, or related to collateral or immaterial matters, and while some of them might have been properly submitted, their refusal presents no error prejudicial to appellant.

It is urged that the twenty-ninth interrogatory is not sustained by sufficient evidence. This ground of the motion for new trial presents no question.

Lastly, it is urged that the verdict is not sustained by sufficient evidence. This ground of the motion for a new trial is urged solely on the evidence of self-defense.

It is insisted that all the evidence shows that Souers did the killing in self-defense.

We cannot agree with this contention. The record of the conviction of Souers in the criminal case was introduced in evidence, and, in addition, there was some evidence from which the jury may have inferred that Souers was not wholly without fault, and that but for his condition resulting from the liquor unlawfully sold to him, when intoxicated, by Brown, or his agent, he (Souers) would never have shot and killed Thomas, who was his brother-in-law.

We find no error in the record, and the judgment is therefore affirmed.

Adams, Myers, Felt, Ibach and Lairy, JJ., concur.

NOTE.—Reported in 98 N. E. 829. See, also, under (1) 31 Cyc. 179; (2) 31 Cyc. 180; (3) 23 Cyc. 320; (4) 31 Cyc. 181; (5) 23 Cyc. 310; (6) 38 Cyc. 1926; (7) 23 Cyc. 324; (8) 1913 Cyc. Ann. 2571; (9) 3 Cyc. 337; 38 Cyc. 1352; (10) 38 Cyc. 1466; (11) 1913 Cyc. Ann. 2572; (12, 13) 23 Cyc. 331; 1913 Cyc. Ann. 2573; (14) 23 Cyc. 331; (15) 23 Cyc. 320, 321; (18) 38 Cyc. 1640; (19) 29 Cyc. 951; (20) 3 Cyc. 348. For a discussion of furnishing liquor as the proximate cause of injury under civil damage acts, see 3 Ann. Cas. 59; 13 Ann. Cas. 200. As to pendency of prior suit in state court as plea in abatement, see 84 Am. Dec. 453. As to pendency of suit in a federal court as plea in abatement in state court, and vice versa, see 82 Am. St. 587. As to the liability of a seller of intoxicants for the acts of persons becoming intoxicated see 85 Am. St.

449. Upon the necessity to sustain a recovery under civil damage act, that the intoxication be the proximate cause of the injury, see 13 L. R. A. (N. S.) 1158. As to the competency of a wife to testify as to misconduct of husband in action under civil damage act, see 39 L. R. A. (N. S.) 316. For the wife's right of action at common law against one selling liquor to husband, see 40 L. R. A. (N. S.) 360. The question of the right of action in absence of civil damage act, for injury or death following unlawful sale of liquor is treated in 34 L. R. A. (N. S.) 1036.

POWELL v. JONES.

[No. 7,666. Filed May 28, 1912.]

1. LANDLORD AND TENANT.—*Liability for Rent.—Surrender of Lease.*—To relieve a lessee from liability for rent during the term of a lease, it must appear that there was either an express surrender of the lease by agreement between the parties that it should cease to be binding, or that a surrender was created by operation of law. p. 496.
2. LANDLORD AND TENANT.—*Lease.—Surrender.—Consideration.*—^{*}An express surrender of a lease is usually required to be in writing, and must be supported by a consideration. p. 493.
3. LANDLORD AND TENANT.—*Lease.—Surrender by Operation of Law.*—A surrender of a lease arises by operation of law on the doing of some act by the parties that is so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. p. 496.
4. LANDLORD AND TENANT.—*Liability for Rent.—Privity of Contract.—Privity of Estate.*—The liability for the payment of rent may be created either by privity of contract or by privity of estate. p. 497.
5. LANDLORD AND TENANT.—*Liability by Privity of Estate.—Surrender.*—Where the liability of a tenant results from privity of estate, and this privity is broken by the tenant's assignment of the lease with the consent of the landlord and the latter's acceptance of rent from the assignee, a surrender arises by operation of law. p. 497.
6. LANDLORD AND TENANT.—*Liability for Rent.—Privity of Contract.—Assignment of Lease.*—Where the liability for payment of rent arises by privity of contract, the acceptance of rent by the lessor from an assignee or sublessee, and a mere agreement to receive him as tenant, merely indicates that the privity of estate is ended and does not relieve the lessee from liability for rent, unless it further appears that such assignee or sub-lessee

was substituted in the place of the original lessee with intent of the parties to the demise to annul its obligations. p. 498.

7. LANDLORD AND TENANT.—*Liability for Rent.—Release of Lessee.—Evidence.—Sufficiency.*—In an action against the original lessee for rent, evidence showing that defendant never personally took possession of the premises, but formed a partnership before the beginning of the term and told the lessor that the firm would take possession of the premises, that lessor said it was all right and gave the firm leave to take possession and received the rent from the firm until her death, that thereafter her executors received the rent, that on defendant's retirement from the firm he notified the executors of that fact and that the premises were in the possession of a new firm, that one of the executors said it was all right and never demanded rent of defendant, but was received from the new firm, was not sufficient to show an intention on the part of the lessor, or her successors under the lease, to discharge defendant from his obligations under the instrument and to substitute in his stead any of the various tenants from whom rent was collected. p. 499.
8. LANDLORD AND TENANT.—*Liability for Rent.—Sub-lessee.*—An agreement between a lessee and his sub-lessee as to the payment of rent is enforceable only by the lessee and does not create a privity of contract between such sub-lessee and the lessor. p. 499.
9. LANDLORD AND TENANT.—*Liability for Rent.—Tenant Never in Possession.*—A tenant under an agreement which is absolute to pay rent is not relieved from his liability by the fact that he has never personally taken possession of the premises if he was not prevented from so doing by the lessor. p. 499.
10. LANDLORD AND TENANT.—*Conveyance of Leased Premises.—Rents.—Rights of Grantee.*—Where leased premises are sold and conveyed, future rents under the existing lease are due and payable to the grantee in the absence of a stipulation to the contrary. p. 500.
11. LANDLORD AND TENANT.—*Lease.—Termination.—Death of Lessor.*—Where the covenant in a lease for the payment of rent is general, without being made payable to any particular person, the lease does not terminate on the death of the lessor. p. 501.
12. LANDLORD AND TENANT.—*Death of Lessor.—Sale of Lease.—Action for Rent.—Evidence.—Admissibility of Executors' Report of Sale.*—Where, on the death of a lessor, the lessor's interest in a lease of her premises was sold by executors of her will, the report of such executors showing such sale and the action of the court in approving the same, was competent evidence in an action by the purchaser against the lessee for the recovery of rent due. p. 501.

From Boone Circuit Court; Willett A. Parr, Judge.

Powell v. Jones—50 Ind. App. 493.

Action by William L. Powell against Mark D. Jones. From a judgment for defendant, the plaintiff appeals. *Reversed.*

B. F. Ratcliff, for appellant.

Terhune & Adney, for appellee.

FELT, J.—Appellant brought this action to collect rents on certain real estate from December 1, 1908, to July 15, 1909. The cause was tried by the court, and from a finding and judgment in favor of appellee this appeal is taken. The only error assigned is that the court erred in overruling appellant's motion for a new trial.

On February 12, 1906, appellee and Mary T. Snow entered into a written lease of certain premises owned by the latter. The term of the lease was for three years from October 21, 1906, with the privilege of five years, for the sum of \$50 per month. Said Mary T. Snow died, testate, on February 14, 1908, and was, at the time of her death, the owner of the leased premises. By the terms of her will, the executors thereof were directed to sell all the real estate of which she died seized, and in July, 1908, they sold the leased premises in question to appellant. After the execution of the lease, and before October 21, 1906, the date it took effect, appellee formed a partnership with one Schooler, and the firm of Jones & Schooler occupied said premises for more than a year thereafter, and paid the rent to decedent up to the time of her death, and to one of her executors for the month of February, 1908. About March 1, 1908, appellee retired from the partnership, and the firm of Schooler & Nelson succeeded to the business in said leased premises. In October, 1908, said Schooler succeeded to all the interests of the firm of Schooler & Nelson, and soon afterwards sold the business to one Campbell, who vacated the premises early in December, 1908. Appellee never made any formal assignment of his lease, and the first question presented by appellant's motion for a new trial is the sufficiency of the evi-

dence to sustain the decision of the court that there was a valid surrender of the lease by appellee, and such an acceptance by Mrs. Snow of other tenants as to release appellee from liability for the rents accruing thereunder.

The evidence admitted on the trial tends to show that appellee never personally took possession of the premises under said lease, but formed a partnership with Schooler before his term was to begin under the lease, and notified Mrs. Snow of the fact, and told her that the firm was to take possession of the property; that she said it was all right, and gave the firm leave to take possession of the premises; that she received the rent from said firm until her death, and her executors received the same for one month thereafter; that when appellee retired from the firm he notified one of said executors of that fact, and that possession of the property had been delivered to Schooler & Nelson; that Mr. Ratcliff, one of the executors, said it was all right; that no demand for the rent was made on appellee until December, 1908, but that after the dissolution of the firm of Jones & Schooler, the rent was paid by its successors to said executors until the property was sold to appellant on July 15, 1908, and was then paid to appellant until December, 1908.

To relieve appellee from liability for rent during the term of the lease, it must appear that there was a surrender of said lease, a mutual agreement between the parties

1. that it should cease to be binding on them. Such a surrender may be either (1) express, or (2) be created by operation of law. An express surrender is
2. usually required to be in writing, and must be supported by a consideration. 24 Cyc. 1366.

There is no evidence in this case of an express surrender.

A surrender arises by operation of law "when the parties to a lease do some act so inconsistent with the subsist-

3. ing relation of landlord and tenant as to imply that they have both agreed to consider the surrender as

made." 24 Cyc. 1367. See, also, *Rees v. Lowy* (1894), 57 Minn. 381, 383, 59 N. W. 310; *Levitt v. Zindler* (1910), 121 N. Y. Supp. 483, 136 App. Div. 695; *Home Coupon Exch. Co. v. Goldfarb* (1909), 78 N. J. L. 146, 74 Atl. 143; *Churchill v. Lammers* (1895), 60 Mo. App. 244, 248.

The law applicable to cases involving the payment of rent is thus stated in *Jones v. Barnes* (1891), 45 Mo. App. 590,

592: "It is undoubtedly the law that a party's obli-

4. gation to pay rent may rest separately on either of two reasons, one by privity of contract and the other by privity of estate. In either case there may be a surrender; but I take it, that much less will constitute a surrender in the case of privity of estate than will suffice in the case of privity of contract. * * * Where a tenant

is not under express covenant to pay rent to his land-

5. lord, and is only liable by reason of his use and occupation, such liability results from privity of estate, and if this is broken by his assignment of the lease with the consent of the landlord and acceptance of rent from the assignee, it is a surrender by operation of law. The original tenant is no longer liable for rent, as the only basis of his liability (privity of estate) has been voluntarily destroyed, and this is true regardless of the intention of the landlord to discharge the liability, as, to repeat again, he has intentionally destroyed the only thing which created the liability. But, when there is an express covenant to pay the rent, the mere breaking of the privity of the estate will not release the lessee. 'There must be an assent of the landlord to the assignment and the acceptance of the subtenant by the landlord with the intent to substitute him in the place of the original lessee.' Wood, Landlord and Tenant 847; *Smith v. Niver* [1848], 2 Barb. 180. By merely collecting rent from the assignee or sublessee, the landlord does not discharge the original lessee who is bound by an express promise. He is only receiving from the sublessee that which has

accrued to him by the privity of estate and what he had a legal right to claim.”

In the absence of a stipulation releasing a lessee who has assigned his lease, or sublet the property from liability for rent, acceptance of rent by the lessor from the as-

6. signee or sublessee, and a mere agreement to receive him as tenant, does not relieve the lessee from such liability. This merely indicates that the privity of estate is ended. *Jordan v. Indianapolis Water Co.* (1902), 159 Ind. 337, 350, 64 N. E. 680; *Heller v. Dailey* (1902), 28 Ind. App. 555, 567, 63 N. E. 490; *Lovejoy v. McCarty* (1896), 94 Wis. 341, 68 N. W. 1003; *Whetstone v. McCartney* (1888), 32 Mo. App. 430, 434; *Rees v. Lowy, supra*; *Barnes v. Northern Trust Co.* (1897), 169 Ill. 112, 118, 48 N. E. 31; *Ghegan v. Young* (1854), 23 Pa. St. 18; *Grommes v. St. Paul Trust Co.* (1893), 147 Ill. 634, 35 N. E. 820, 37 Am. St. 248; *Bradley v. Walker* (1900), 93 Ill. App. 609; *Gerken v. Smith* (1890), 11 N. Y. Supp. 685; *Bonetti v. Treat* (1891), 91 Cal. 223, 229, 27 Pac. 612, 14 L. R. A. 151; *Detroit Pharmacal Co. v. Burt* (1900), 124 Mich. 220, 82 N. W. 893.

It must further appear that the sub-lessee was substituted in the place of the original lessee, with the intent, on the part of the parties to the demise, to annul its obligations. *Hunt v. Gardner* (1877), 39 N. J. L. 530, 533; *Wallace v. Kennelly* (1885), 47 N. J. L. 242; *Hoerdts v. Hahne* (1900), 91 Ill. App. 514, 522.

As was said in *Hunt v. Gardner, supra*, at page 534: “To ascribe the effect of a surrender to the mere act of the landlord accepting the assignee as his tenant, and receiving rent from him, would be going beyond the precedents. To warrant the inference that the original lease has been annulled, the facts ought to be of an entirely conclusive character.”

The evidence in this case does not show that it was ever the intention of Mrs. Snow, or her successors under the lease, to discharge appellee from his obligations under said

instrument, and to substitute in his stead any of
7. the various tenants from whom rent was collected.

There is no evidence of anything more than a privity of estate between the owners of the property and the tenants in possession thereof; and any agreement which ap-
8. pellee may have had with said tenants, as to the payment of the rent as it became due cannot control in this case, since such an agreement is enforceable only by appellee against such tenants, and would not create a privity of contract between such tenants and the lessor, or those succeeding to her rights under the lease. *Bonetti v. Treat, supra*.

Nor does the fact that appellee never personally took possession of the property under said lease relieve him from liability thereunder, for an action may be maintained
9. on an agreement which is absolute to pay rent, where there is a demise, and the lessor is not in fault in preventing actual enjoyment, although the tenant has not taken possession of nor used the demised premises. *Union Pac. R. Co. v. Chicago, etc., R. Co.* (1896), 164 Ill. 88, 110, 45 N. E. 488.

Appellee bases his claim of nonliability mainly on testimony showing that when he formed his partnership with Schooler he notified Mrs. Snow that the firm was to
7. take possession of the property, and she said it was all right, gave her consent to the firm's occupancy of the premises under the lease, and thereafter received rent from such occupants.

The lease provides "that the premises are to be occupied by Mark Jones for a storeroom and for no other purpose.
• • • are not to be sub-leased by the said Jones without the consent of the said Mary T. Snow."

The subsequent conversation relating to the occupancy of the leased premises must be considered in the light of the provisions of the lease, and when so considered, the evidence relied on does not tend to show that there was a substitution

of the firm of Jones & Schooler or other tenants, for the original lessee, with either an express or implied agreement that said lessee should be relieved from his obligation to pay the rent. There was no express surrender of the lease, nor do the facts warrant us in holding that there was a surrender to the lessor by operation of law and a releasing to other tenants. The provision of the lease made it necessary for appellee to obtain the consent of the lessor for the firm, instead of the lessee, to occupy the premises.

Such consent by the lessor, and her subsequent receipt of rent from said firm, was not inconsistent with or contradictory of the terms of the lease. Appellee's obligation was satisfied to the extent of the amounts paid by the several occupants of the premises, but the evidence does not show that he was relieved from his obligation as to rents accrued under the lease and remaining unpaid.

Appellee also insists that the provisions of the lease for the payment of rents accruing thereunder in the future did not inure to appellant as the purchaser of the leased premises.

The decisions of this court and our Supreme Court are to the effect that future rents under an existing lease, where the leased premises are sold and conveyed, are due

10. and payable to the grantee, unless there is a stipulation to the contrary. *Hammond v. Jones* (1908), 41 Ind. App. 32, 38, 83 N. E. 257; *Chandler v. Pittsburgh Plate Glass Co.* (1898), 20 Ind. App. 165, 50 N. E. 400; *Kellum v. Berkshire Life Ins. Co.* (1885), 101 Ind. 455.

Furthermore, in this case appellant avers that by the terms of the last will and testament of Mrs. Snow, her executors were authorized to sell all her estate and convert the same into money; that pursuant to such authority and direction said executors sold the property in question to appellant, and as a part of the consideration for said sale "they sold, transferred and set over unto said purchaser all the

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rights, title and interest, from and after the date of said sale, in and to'' the lease here involved.

Where the covenant to pay rent is general, as in this case, without being made payable to any particular person, the lease does not terminate on the death of the lessor.

11. *Jaques v. Gould* (1849), 58 Mass. 384; *Watson v. Penn* (1886), 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26; *Kolasky v. Michels* (1890), 120 N. Y. 635, 24 N. E. 278.

It follows, therefore, that all rights under such a lease will inure to the original lessor's successor in title. The averments of the complaint show appellant to be the lawful owner of the leased premises and of the lease, and such averments, when proved, establish appellant's right to maintain this action.

The report of the executors of the will of Mrs. Snow, showing the sale of said lease, and the action of the

12. court in approving the same, were competent evidence, and should not have been excluded by the court, as shown by the record.

The motion for a new trial should have been sustained.

Judgment reversed, with instructions to the lower court to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Hottel, C. J., Lairy, Myers, Ibach and Adams, JJ., concur.

NOTE.—Reported in 98 N. E. 646. See, also, under (1) 24 Cyc. 1162; (4) 24 Cyc. 1176; (5) 24 Cyc. 1371; (6) 24 Cyc. 1371, 1372; (7) 24 Cyc. 1162, 1370; (8) 24 Cyc. 1176, 1183; (9) 24 Cyc. 1144; (10) 24 Cyc. 1172; (11) 24 Cyc. 1340; (12) 24 Cyc. 1222. As to what a landlord may do, on tenant's abandoning the premises, and still hold the tenant to his contract, see 114 Am. St. 717. As to the assignment of leases and the effect thereof on the parties, see 10 Am. St. 557. On the effect of surrender of original lease on rights of sublessee, see 7 L. R. A. (N. S.) 221.

EVANSVILLE SUBURBAN AND NEWBURGH RAILWAY
COMPANY v. EVANSVILLE AND EASTERN
ELECTRIC RAILWAY ET AL.

[No. 7,682. Filed May 28, 1912.]

1. RAILROADS.—*Interurban*.—*Powers*.—The powers and authority of interurban railroad companies are circumscribed by the street railway law of 1861 (Acts 1861 [s. s.] p. 75, §4143 R. S. 1881), as amended and supplemented by later enactments (§4294 Burns 1908, Acts 1903 p. 180; §5630 *et seq.* Burns 1908, Acts 1901 p. 119). p. 508.
2. RAILROADS.—*Interurban*.—*Nature of Business*.—*Rights and Liabilities*.—Since the business of interurban railroad companies is public in its nature and directly involves public interests, they are invested with powers not given to individuals nor strictly private corporations and their rights and liabilities must be construed and measured by the law applicable to *quasi* public corporations. p. 508.
3. RAILROADS.—*Interurban*.—*Contracts*.—*Specific Performance*.—In a proceeding for the specific performance of a contract between two interurban railroad companies providing for the transportation of freight and passenger business of the one over the tracks of the other, the court will look to the probable consequences of its enforcement, and the interests, if any, to be affected thereby, before considering individual advantages. p. 509.
4. RAILROADS. — *Interurban*. — *Contracts*. — *Traffic Agreement*. — *Abandonment of Franchise Rights*.—*Validity*.—A contract between two interurban railroad companies whereby the one shall control and transport over its line between certain points all the freight and passenger business of the other for a period of thirty-five years, amounts to a prohibition against the latter company operating its road in territory occupied by the other, and is therefore invalid as tending to stifle competition and to create a monopoly. pp. 509, 510, 514.
5. RAILROADS.—*Interurbans*.—*Duties*.—*Abandonment*.—By the acceptance of its franchise, an interurban railroad company is charged with the performance of certain well defined public duties which it cannot at will cast aside and repudiate, so as to defeat the purposes of its organization. p. 510.
6. RAILROADS.—*Powers*.—*Contracts*.—Railroad corporations are incapable of entering into contracts beyond the scope of their powers, expressed or necessarily implied in furtherance of those expressly granted, or of absolving themselves from their obliga-

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tions to the public, or from performing their corporate duties, without legislative consent. p. 513.

7. **CONTRACTS.—Enforcement.—Remedy.**—The legal effect of a contract is of controlling influence in determining the remedy the parties may have for its enforcement. p. 513.

8. **INJUNCTION.—Mandatory Injunctions.—When Will Be Granted.**—Mandatory injunctions will be granted only to prevent serious damage, and to obtain such relief the complainant must make out a clear case. p. 514.

9. **RAILROADS.—Interurban.—Powers.—Traffic Agreements.—Traction** companies may make valid traffic or operating agreements for the use by one of another's tracks, terminals, equipment, etc., where no monopoly is thereby created and neither company incapacitates itself from performing its duties to the public, or foregoes its charter rights to construct and operate a competing road. p. 514.

10. **RAILROADS. — Interurban. — Traffic Agreements. — Validity. — Statute.**—A contract between two interurban railroad companies, whereby the one shall control and transport over its line between certain points all the freight and passenger business of the other for a number of years, is not authorized by §5652 Burns 1908, Acts 1903 p. 330, providing that a street railroad company may sell, lease or otherwise transfer its property, franchises, etc. p. 514.

From Vanderburgh Circuit Court; *Curran A. DeBruler*, Judge.

Action by the Evansville Suburban & Newburgh Railway Company against the Evansville & Eastern Electric Railway and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

George A. Cunningham, Iglehart & Taylor, for appellant.

Albert W. Funkhouser, Arthur F. Funkhouser, Woodfin D. Robinson and William E. Stilwell, for appellees.

MYERS, J.—Appellant, hereafter called the Newburgh Company, commenced this suit against appellees, the Evansville and Eastern Electric Railway, hereafter referred to as the Rockport Company, and certain named persons as its directors; also the Evansville Terminal Railway, and the Evansville Railways Company, for a mandatory injunction requiring the Rockport Company, its officers, agents and

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employees, specifically to perform the provisions of a certain alleged contract, and to deliver its cars, both freight and passenger, at Newburgh, to appellant for transportation over its line, according to the terms of that contract, and that the Rockport Company, its officers, agents and employees, be enjoined from further refusing to perform said contract, and from having any dealings with the Evansville Terminal Railway in violation thereof.

The complaint was in two paragraphs. Separate and several demurrers to each of these paragraphs, for want of facts, by appellees, other than the persons named as directors, who joined in a demurrer, were sustained, and appellant refusing to plead further, judgment was rendered against it. The rulings of the court in sustaining the several demurrers are assigned as errors. The cause was appealed to the Supreme Court, and on the order of that court it was transferred to this court.

The questions controlling the decision of this case rest on a proposition and its acceptance, both made a part of each paragraph of the complaint, and relied on by appellant as forming the contract made the basis of its cause of action. That part of the proposition and acceptance at all material here is as follows:

“(1) The arrangement hereby proposed if entered into shall continue for the period of thirty-five years from the date the same becomes effective by the execution of a contract between us.

(2) In consideration of the rights hereby granted to you by it, it is understood that all of the business of your company so far as transportation between Evansville and Newburgh is concerned shall be done under this contract, and all of your cars, both freight and passenger, shall make use of the track of our company between Evansville and Newburgh under the terms of this agreement.

(3) The Evansville Suburban and Newburgh Railway Company will upon the completion of your line from the end of its electrified tracks in Newburgh at the corner of State and Water streets to Rockport, Indiana,

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transport your cars, passenger, freight and express to and from Evansville over its line and allow you the use of its terminals, both freight and passenger, in Evansville for said term of thirty-five years.

The terms on which such service shall be conducted and the rental to be paid by your company to this company for the use of its terminals to be the subject of mutual agreement between the two companies, or in case an agreement can not be reached, then this question is to be submitted to arbitration as hereafter provided. It is expressly understood that nothing in this agreement contemplates the doing by your company of any business between Newburgh and Evansville proper, and intermediate stations and all the revenues derived therefrom shall belong to this company.

In case of such disagreement each of the parties shall select an impartial arbitrator, and the two arbitrators so chosen shall select a third arbitrator and the award of the three arbitrators so chosen shall be binding upon the parties.

* * *

(4) You are to furnish first-class, modern, properly equipped cars acceptable to our company. We will furnish conductors and motormen for your cars while in use on our line and they shall collect all fares between Newburgh and Evansville. All of your cars while on our road shall be subject to the control and direction of our company.

* * *

(6) The right is reserved by this company to operate its freight trains and haul all freight on your tracks between State street in Newburgh, Indiana, and 'Archbold Coal Mines', so as not to interfere with the operations of your passenger cars over the same.

It is understood that the usual per diem charged for freight cars shall be made by the party entitled thereto in addition to its pro rata share of said freight and express tariff.

* * *

(10) On default by you in the payment of the amounts due monthly to this company, or on default by you in the performance of any of the other conditions herein required of you, this company shall have the right to give you notice in writing, specifying wherein you are in default and requiring you within ten (10) days

to correct the same. On your failure so to do within said time this company shall have the right upon giving an additional notice of ten (10) days in writing to terminate this contract, or it may at its option terminate the same by suitable legal proceedings.

(11) All of your cars shall be of the standard gauge of the track of this company and shall be of approved construction and weight to operate over said track without damaging the same in any manner, and all of your cars shall be operated under such schedules as may hereafter be agreed upon by the two companies and not interfere with the cars of this company.

* * *

(14) The expense incurred in the sale of tickets and in providing and maintaining suitable passenger terminals and freight terminals in Newburgh shall be borne by each company *pro rata* according to the business done.

(15) It is expressly understood that the rights granted to you over our road between Evansville and Newburgh are not exclusive, and we reserve the right to operate our own cars, both freight and passenger, between said points as heretofore done by us and upon such reasonable schedules as shall accommodate the convenience of both of us.

* * *

(19) It is understood that such details of the arrangement hereby proposed as are not herein covered shall be determined by the mutual agreement of the parties as occasion requires, and in case of disagreement by arbitration in the manner above provided."

At the time of the acceptance, the parties agreed to the following interpretation of the proposition:

"It is the understanding that your company shall take charge of our cars at Newburgh and that your own conductor and motorman shall bring them into Evansville. That the amount which shall come to us and to you out of the fares for passengers to and from points east of Newburgh shall be adjusted between the two roads, and that all freight or express matter brought over the road to and from points east of Newburgh shall also be adjusted. That these matters, together with the amount that shall be paid your road for use of its tracks and terminals and the amounts which shall be

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allowed to our road for the use of the cars, are all matters to be settled by arbitration. It is also our understanding that the arbitration which is made shall not be conclusive for the whole time of the contract, but that successive arbitrations may be had at the request of either person at periods of say five years. It is also our understanding that the clause providing for the termination of the contract upon ten days' notice, to wit: Section 10 of the contract, shall not apply to cases where there is a bona fide difference as to whether there is or is not a breach of the contract. Such breaches shall be submitted to arbitration also. It is also our understanding that nothing in the contract shall prevent the taking on or letting off of passengers by our cars between Newburgh and Evansville, and any clauses in the contract appearing to be contrary to this are only intended to refer to the fares which are to be taken and who shall be entitled to them."

The aforesaid proposition was dated April 25, 1906, and at that time appellant was operating a line of electric railway from Evansville to Newburgh. Prior to that time the Rockport Company had been incorporated to construct an electric line of railway from Evansville to Rockport, paralleling appellant's line to Newburgh, but being unable to finance the proposed enterprise, it sought and obtained from appellant the proposition, which, with the agreed interpretation, was accepted by the Rockport Company May 8, 1906. The Rockport Company thereafter constructed its road from Newburgh to Rockport, connecting with appellant's road at Newburgh, and together forming a through line between Evansville and Rockport, which was opened for business in June, 1907. Under the contract between the two companies, all of the Rockport Company cars, both passenger and freight, were turned over to appellant at Newburgh and in charge of its agents, servants and employes they were run over appellant's track to Evansville, and from Evansville back to Newburgh, where they were released to the Rockport Company. It further appears that the Rockport Company, aided, encouraged and with the coöperation of its

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coappellees, violated and repudiated its contract with appellant, by changing and transferring in part, and threatening to change and transfer all of its business and the running of its cars between Newburgh and Evansville from appellant, and its line of road and tracks to a parallel line of road since constructed between said two last-named points by the Evansville Terminal Railway, a corporation caused to be formed by the officers of the Rockport Company.

In the consideration of this case we will treat appellant's proposition and the interpretation placed thereon by the parties as one instrument, and hereafter, for the purpose of brevity, refer to them as the contract. This contract, appellee Rockport Company insists is invalid for the following reasons: (1) The Rockport Company had no power to make the contract. (2) The contract is void as being against public policy. (3) The contract is not of such nature that it can be specifically enforced. On the other hand, appellant contends that the facts disclosed show that the contract is expressly authorized by statute (§5652 Burns 1908, Acts 1903 p. 330), but if not so authorized, the two corporations clearly had the power to make it, for the reason that it was no more nor less than a trackage or operating agreement, and authorized by law as an incident to the business in which they were engaged.

The first question presented challenges the validity of the contract.

Both parties to the contract were Indiana corporations. Their powers and authority are circumscribed by the street railway law in force September 7, 1861 (Acts 1861

1. [s. s.]p. 75, §4143 R. S. 1881), as amended and supplemented by later legislative enactments. §4294 Burns 1908, Acts 1903 p. 180; §5630 *et seq.* Burns 1908, Acts 1901 p. 119. Their business is public in its nature, and directly involves public interests. For that
2. reason they are invested with powers not given to individuals nor strictly private corporations. *Board,*

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. *etc.*, v. *Lafayette, etc., R. Co.* (1875), 50 Ind. 85, 108. Being granted these exceptional powers by the State, their rights and liabilities are to be construed and measured by the law applicable to that class of corporations known as *quasi public*. 1 Thompson, Corporations (2d ed.) §§32, 33.

In this case the extraordinary jurisdiction of the court is sought by one of the parties to compel the other to perform its part of a certain contract. In view of the

3. nature of that contract, the business affected, and the relief sought, it is important that we look to the probable consequences of its enforcement, and the interests, if any, to be affected thereby, before considering individual advantages. For it must be kept in mind that "railroad corporations are regarded as public agencies, owing duties to the public generally. Accordingly, they can make no contract which shall prohibit them from serving the public as the future demands of business or concentration of population may require." *Louisville, etc., R. Co. v. Sumner* (1886), 106 Ind. 55, 59, 5 N. E. 404, 55 Am. Rep. 719.

It is apparent from the contract in question that the Rockport Company had agreed to abandon, for a period of thirty-five years, its purpose and its franchise rights

4. obtained from the State to construct and operate a road between Evansville and Newburgh. This is so, for the reason that it has expressly agreed (1) that the transportation of all of its business between Evansville and Newburgh shall be done by appellant, and all its cars, both freight and passenger, between these two points, shall use appellant's track; (2) that appellant shall take absolute charge and control of the Rockport Company's cars at Newburgh, and retain possession of them until they are returned to Newburgh; that none of such cars shall stop to take on or put off passengers in the present corporate limits of Newburgh, east of State street; (3) it shall do no business between Newburgh and Evansville proper, and intermediate stations; (4) all revenues derived from business done be-

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tween Newburgh and Evansville shall belong to appellant; (5) it agrees to furnish cars acceptable to appellant, and of approved construction and weight to operate over appellant's track without damaging the same in any manner.

The observance of these stipulations by the Rockport Company eliminated it as a competing line between Evansville and Newburgh as completely as though it never existed. The control and management of its cars was limited to its track east of Newburgh, and its business with the public confined to such as originated or was consigned to points on its completed line. This condition, under the terms of the contract, was to continue for a period of thirty-five years, for it agreed that all of its business between Evansville and Newburgh should be done by appellant, and under the latter's direction and control. The Rockport Company held a

franchise to construct and operate an electric line of
5. railway between Evansville and Rockport, by way of Newburgh. The acceptance of this franchise carried with it certain privileges and powers conferred only on the theory that the purpose to be accomplished was the promotion of public interests by a legal entity, regarded as a public agent. Hence the Rockport Company, as a common carrier, was charged with the performance of certain well-defined public duties, which it could not at will cast aside and repudiate, so as to defeat the purpose of its organization, without offending the law of its creation. *State, ex rel., v. Portland, etc., Oil Co.* (1899), 153 Ind. 483, 53 N. E. 1089, 53

L. R. A. 413, 74 Am. St. 314. It does not follow
4. from the mere fact that cars of the Rockport Company were run to Evansville, that it was operating a road to that point, or that it had not abandoned any of its duties as a public service corporation. As further tending to illuminate the force of the contract in question, it appears that the Rockport Company for a time ran its cars over appellant's track, forming a continuous line from Rockport to Evansville, yet its right to continue so to do depended on

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whether said cars were acceptable to appellant, and of approved construction and weight. This provision of the contract, in the absence of any stipulation on the part of appellant to improve its road and track to meet the necessary demands of the new company, enabled it to control the size and construction of the Rockport Company's cars, if they would go to Evansville, for a period of thirty-five years, regardless of the rights, convenience or future reasonable demands of the public.

In the case of *Thomas v. West Jersey R. Co.* (1879), 101 U. S. 71, 83, 25 L. Ed. 950, the court, in speaking of a principle under which contracts such as we have here are invalid, not because they are strictly within the doctrine *ultra vires*, said: "That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

In the case of *Union Pac. R. Co. v. Chicago, etc., R. Co.* (1896), 163 U. S. 564, 581, 16 Sup. Ct. 1173, 1180, 41 L. Ed. 265, as applicable to the question under consideration, the general rule is stated as follows: "Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the State, disable themselves from the discharge of the functions, duties and obligations which they have assumed."

In the case of *Muncie Nat. Gas Co. v. City of Muncie* (1903), 160 Ind. 97, 103, 66 N. E. 436, 60 L. R. A. 822, the court, in speaking of *ultra vires* contracts, said: "Without

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attempting to cover the whole ground, it may be said that if a contract is of such character that had the corporation at once proceeded to execute it, its act would have been contrary to public policy, or expressly or impliedly prohibited by statute, or would, in any degree, disable the corporation from the performance of its statutory duties, the undertaking cannot be enforced by either party. To this extent the cases, English, federal, and state, are in reasonable harmony.”

In the case of *American Express Co. v. Southern Ind. Express Co.* (1906), 167 Ind. 292, 78 N. E. 1021, it was said: “All rules, practices, customs, and usages designed to destroy competition in business, or necessarily having that effect, are inimical to the public well-being, and were condemned by the common law.”

In *State, ex rel., v. Portland, etc., Oil Co., supra*, the following language was used: “It is an old and familiar maxim that ‘Competition is the life of trade,’ and whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests and is therefore deemed to be unlawful, on the grounds of public policy.”

The last two quotations were given with approval in the case of *Tousey v. City of Indianapolis* (1911), 175 Ind. 295, 94 N. E. 225, in which case it was held that the common-law rule is in noway modified in Indiana.

In the case of *Chicago, etc., R. Co. v. Southern Ind. R. Co.* (1906), 38 Ind. App. 234, 70 N. E. 843, this court, in considering a contract whereby one railroad company agreed not to so construct its road or switches as to divert the benefits derived by another company from certain stone-quarries said: “By this agreement the two railroad companies undertook to contract away the rights of third parties, without their knowledge, and in defiance of the public duty devolved upon such companies.” It was held that the contract had

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the effect of depriving the shipper of the benefits of competition, and tended to create a monopoly in one of the contracting parties, against public policy and contrary to the law which seeks to prevent the creation of monopolies, and to foster fair competition.

The decided cases, with marked unanimity, hold that railroad corporations are incapable of entering into contracts

beyond the scope of their powers, expressed or necessarily implied in furtherance of those expressly granted, or of absolving themselves from their obligations to the public, or from performing their corporate duties without legislative consent. *Board, etc., v. Lafayette, etc., R. Co., supra*; *Thomas v. West Jersey R. Co., supra*; *Eel River R. Co. v. State, ex rel.* (1900), 155 Ind. 433, 57 N. E. 388; *Peoria, etc., R. Co. v. Coal Valley Min. Co.* (1873), 68 Ill. 489; *Richardson v. Sibley* (1865), 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Black v. Delaware, etc., Canal Co.* (1871), 22 N. J. Eq. 130; *Gulf, etc., R. Co. v. Morris* (1887), 67 Tex. 692, 4 S. W. 156; *Florida, etc., R. Co. v. State, ex rel.* (1893), 31 Fla. 482, 13 South 103, 20 L. R. A. 419, 34 Am. St. 30; *St. Joseph, etc., R. Co. v. Ryan* (1873), 11 Kan. 602, 15 Am. Rep. 357; *Central, etc., R. Co. v. Morris* (1887), 68 Tex. 49, 3 S. W. 457; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.* (1886), 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Fanning v. Osborne* (1886), 102 N. Y. 441, 7 N. E. 307; 1 Elliott, Railroads (2d ed.) §359; 3 Thompson, Corporations (2d ed.) §2906.

The legal effect of the contract, and not its form, or the alleged pretense for its execution, is of controlling influence in determining the remedy the parties may have

7. for its enforcement, and mandatory injunctions will be granted only to prevent serious damage. 16 Am. and Eng. Ency. Law (2d ed.) 343. A judicial approval and the enforcement of the contract in question would prohibit

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the Rockport Company, for a period of thirty-five
8. years, from operating a road between Newburgh and Evansville, and have the effect of validating a contract of doubtful validity at most, when construed in the light of the objects intended to be accomplished by the granting of the franchise. Here a mandatory injunction is prayed, which should be allowed in a proper case, but as a rule, courts will not grant an extraordinary remedy unless the complainant makes out a clear case. But the decision in this case rests on other grounds.

Traction companies may make valid traffic or operating agreements for the use by one of another's tracks, terminals, equipment, etc., where, by so doing, neither company
9. incapacitates itself from performing its duties to the public, or does not create a monopoly in favor of one of the contracting parties, or foregoes its charter rights to construct and operate a competing road, except such contract be authorized by the governing statute. 1 Elliott, Railroads (2d ed.) §357; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, *supra*.

In this case we are referred to §5652, *supra*, as the statute authorizing the present contract. That statute has to do
with a sale or lease, and we do not regard the con-
10. tract before us as either. *Troy, etc., R. Co. v. Boston, etc., R. Co.* (1881), 86 N. Y. 107. The Newburgh Company did not intend to buy the franchise of the Rockport Company between Newburgh and Evansville, nor did the latter company attempt to sell or lease the unconstructed portion of its road, or other property. As we see the transaction, it amounted to a prohibition against one com-
4. pany operating its road in territory occupied by the other, and therefore invalid on the ground that it tends to stifle competition, and to create a monopoly. *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, *supra*.

For the reasons stated, we are not convinced that this is a

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case where the court can safely grant a mandatory injunction. Judgment affirmed.

Hottel, C. J., Lairy, Felt, Adams and Ibach, JJ., concur.

NOTE.—Reported in 98 N. E. 649. See, also, under (2) 33 Cyc. 38, 69; (3) 33 Cyc. 421; 36 Cyc. 620; (4) 33 Cyc. 410; (5) 33 Cyc. 69; (8) 22 Cyc. 749. As to the validity of contracts between public service corporations to fix prices or rates, or to divide trade or territory, see 6 Ann. Cas. 157. As to the invalidity of combinations between carriers as stifling competition, see 74 Am. St. 249; as to the general effect on a street railway company of the acceptance by it of its franchise, see 104 Am. St. 637.

TAYLOR ET AL. v. CAMPBELL ET AL., TRUSTEES.

[No. 7,688. Filed May 28, 1912.]

1. **APPEAL.—Objections to Introduction of Evidence.**—Only such reasons as are assigned in the trial court as objections to the introduction of evidence will be considered on appeal. p. 519.
2. **TRIAL.—Objection to Evidence.—Sufficiency.**—An objection to the admission of evidence must be specific and state the grounds of objection. p. 520.
3. **APPEAL.—Review.—Ruling on Objection to Admission of Evidence.**—It is not error to overrule an objection to the admission of evidence where no grounds of objection are stated. p. 520.
4. **DEEDS. — Conditions Subsequent. — Construction.** — Conditions subsequent in deeds are not favored in law and are strictly construed. p. 523.
5. **DEEDS.—Construction.**—The language of a deed will be construed so as to ascertain, if possible, the intention of the parties, and where the deed admits of two constructions, the one least favorable to the grantor will be adopted. p. 523.
6. **DEEDS.—Construction.—Defeasible Estates.—Conditions Subsequent.**—Where a conveyance of land to the trustees of a church recited that it was to be held in trust for the use of the members of such church according to its rules and discipline, and imposed no restraint on alienation and contained no provision for forfeiture in the event the property ceased to be used for church purposes, the recital that the grant was in trust for the uses and purposes therein set out did not create a defeasible estate nor condition subsequent for the violation of which a forfeiture or reversion would result, but was merely a directory provision enforceable at the instance of the church. p. 524.

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From Elkhart Superior Court; *Vernon W. Van Fleet*, Judge.

Action by Marvin Campbell and others as Trustees of the First Methodist Church of South Bend against Charles J. Taylor and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

T. E. Howard, for appellants.

Anderson, Parker & Crabill and *J. S. Crumpacker*, for appellees.

ADAMS, P. J.—The appellees, as trustees of the First Methodist Episcopal Church of South Bend, Indiana, brought this action against appellants, to quiet their title in and to a certain lot in the city of South Bend, on which a church building occupied by the congregation of the First Methodist Episcopal Church is located. Appellees claim title in fee simple to the lot, by virtue of a deed to their predecessors in trust, executed December 6, 1848, by Edmund P. Taylor and Phebe S. Taylor, his wife.

The facts, about which there is no controversy, are that appellees, in their capacity as trustees of the First Methodist Episcopal Church of South Bend, desiring to change the location of their church edifice, on account of the growth of the city rendering the present location undesirable, by reason of such location being in the business section of the city, contracted to sell the present church building and the lot on which it stands, and reinvest the proceeds in a more desirable location, and to erect thereon a modern church building, provided they could convey a clear title to the lot on which the present church stands.

Appellants are the heirs and descendants of the grantors of said premises to appellees' predecessors in trust, and contend that under the provisions of the deed from their ancestors, title to said real estate will be forfeited and revert to them, if appellees sell and convey the premises in

controversy. This is the important and controlling question presented by the record before us.

The case was tried by the court, the facts were found specially, and the conclusion of law stated thereon favorable to appellees. Judgment on the conclusion of law, quieting appellees' title to the real estate in question.

Errors assigned and relied on for reversal are that the court erred (1) in its conclusion of law; (2) in overruling appellants' motion for a new trial.

The court found that appellees are the duly elected, qualified and acting trustees of the First Methodist Episcopal Church of South Bend, Indiana; that they are the successors in trust of John Brownfield, Albert Monson, William Stanfield, Charles M. Heaton and Francis R. Tutt, who were the duly elected, qualified and acting trustees of said church society on December 6, 1848, at which time the name of said society was "The Methodist Episcopal Church of South Bend, Indiana"; that all the property rights owned by and vested in said trustees are now owned by and vested in appellees as a body politic and corporate under the laws of the State of Indiana; that the deed executed by Edmund P. Taylor and wife to the trustees above named on December 6, 1848, is as follows:

"THIS INDENTURE, made the sixth day of December, in the year of our Lord, Eighteen Hundred and Forty-eight, between Edmund P. Taylor and Phebe Taylor, his wife, of the County of St. Joseph and State of Indiana, of the first part, and * * *, Trustees of the Methodist Episcopal Church of the Town of South Bend, County and state aforesaid, of the second part, WITNESSETH: That the party of the first part for and in consideration of the sum of Three Hundred and Twenty Dollars, lawful money to them in hand paid, the receipt whereof is hereby acknowledged, have given, bargained, sold, released, confirmed and conveyed, and by these presents do give, grant, bargain, sell, release, confirm and convey unto them, the said party of the second part, and their successors, and to the assigns of

the said party of the second part, or to the assigns of their successors, Trustees in Trust for the use and purposes hereinafter mentioned and declared, all that certain lot or tract or parcel of land, lying and being in the county aforesaid, and known and designated as lot numbered two hundred and fifty two (252) on the Original Plat of the Town of South Bend, County and State aforesaid, and all the estate, right, title, interest, property, claim and demand whatsoever, which the said party of the first part have in or to the lot or parcel of land aforesaid described. To have and to hold the lot and premises aforesaid, together with all the appurtenances aforesaid unto them, the said party of the second part, and their successors in office and the assigns aforesaid forever, in trust, that they shall erect and build or cause to be built thereon a house or place of worship for the use of the members of the Methodist Episcopal Church, in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conference in the United States of America. And in further trust that they shall at all times forever hereafter permit such ministers and preachers belonging to the said church as shall from time to time be duly authorized by the general conference of the ministers and preachers of the said Methodist Episcopal Church, or by the annual conferences authorized by the General Conference, to preach and expound God's Holy Word therein. * * *

The court found that the real estate was purchased and the deed executed to the trustees named under and in accordance with the regulations, by-laws and discipline of the Methodist Episcopal Church, duly adopted, promulgated and in force at the time said real estate was purchased and the deed therefor executed; that the church edifice erected on said lot in the year 1848, and remodeled in 1869, is within the business district of the city of South Bend, and is no longer suitable for church purposes and uses; that the present trustees have contracted to sell said lot and building, and that the sale of the same depends on their right to convey a good and sufficient title thereto; that the

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intention and purpose of said trustees is to use the proceeds of the sale of the church property to purchase another lot in a favorable location for church purposes in the city of South Bend, and to erect thereon a suitable church building; that appellants assert and claim that on the sale of said real estate and on the cessation of the use thereof for church purposes, they will become vested with title to the same, as the heirs at law of the original grantors.

On the facts found, the court stated as its conclusion of law that appellees are vested with a fee simple title to said real estate, and have a good right to sell and convey the same, as they are proposing to do, and that any and all claims of the appellants and each of them in and to said real estate now, or upon a sale and conveyance thereof, are unfounded and without right, and are a cloud on the title of appellees, and that said title ought to be quieted in appellees as against appellants and all persons claiming by, through or under them.

Error assigned on the overruling of appellants' motion for a new trial calls in question the admission of certain evidence. At the trial, the court permitted appellees, over the objection of appellants, to offer in evidence section 2 of the doctrines and discipline of the Methodist Episcopal Church, in force at the time the deed was executed, which gives the form of deed to be taken in the purchase and conveyance of church property. The deed herein set out followed the form provided. The court also received in evidence, over appellants' objection, certain sections of the rules and discipline of the Methodist Episcopal Church, for the year 1908. It is unnecessary to set out this evidence, as no grounds of objection to its introduction are shown in the record.

1. It has often been held that only such reasons as are assigned in the trial court as objections to the introduction of evidence, will be considered on appeal. It is also the settled law of this State that an objection to the admis-

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sion of evidence must be specific, and state the

2. grounds of objection. *City of Garrett v. Winterich* (1909), 44 Ind. App. 322, 327, 328, 87 N. E. 161, 88 N. E. 308; *Hammond, etc., Electric R. Co. v. Antonia* (1908), 41 Ind. App. 335, 340, 83 N. E. 766; *Pichon v. Martin* (1905), 35 Ind. App. 167, 171, 73 N. E. 1009; *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541, 548, 70 N. E. 888; *Everitt v. Indiana Paper Co.* (1900), 25 Ind. App. 287, 290, 57 N. E. 281.

Action of the trial court in receiving the evidence of certain witnesses, that the church property is in the business district of the city of South Bend, and no longer

3. suitable for church purposes, is also assigned as cause for a new trial. The record does not show that any grounds of objection were stated. There was, therefore, no error in overruling appellants' objection, for the reasons above set out.

All other questions raised by the assignment of errors are comprehended within the single issue, Did the deed to appellees' predecessors in trust convey a title which would revert to the grantors, or their heirs, on the sale of the property, or when it ceased to be used for church purposes?

Appellants contend that where lands are conveyed to trustees to be used as a place of worship by a religious society forever, a contract for the sale of the property for the purpose of reinvesting the proceeds in other property works a reversion in the grantor or his heirs, as of the date of such contract, citing in support, *Trustees, etc., v. Alexander* (1898), 46 S. W. (Ky.) 503; *Scott v. Stipe* (1859), 12 Ind. 74; *Grissom v. Hill* (1856), 17 Ark. 483; *First Universalist Society v. Boland* (1892), 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

It is conceded by appellants that where lands are conveyed "for the use of" a certain grantee, or "to be used for" a definite purpose, the words are generally held to vest complete title in case the condition is once fulfilled; but where

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lands are conveyed "to be used forever" or "permanently" for a given purpose, the title will fail and revert if the lands cease to be used for the purpose named in the instrument of conveyance. *Indianapolis, etc., R. Co. v. Hood* (1879), 66 Ind. 580; *Jeffersonville, etc., R. Co. v. Barbour* (1883), 89 Ind. 375; *Cleveland, etc., R. Co. v. Coburn* (1883), 91 Ind. 557.

We think these cases are easily distinguishable from the case at bar. In the case of *Trustees, etc., v. Alexander, supra*, one Wallace devised twenty acres of land and a building to Forest Hill Church in perpetuity, as a place of worship. The court, in declaring the reversion, at page 504 said: "The property was devised as a place of worship, and the title was given conditioned upon its use for that purpose, or, at least, upon its being applied to no other." It will be noted that the property devised in this case was dedicated to a certain use, which appears to have been the only consideration.

In the case of *Scott v. Stipe, supra*, the grantor conveyed the property to the use of the trustees of the Bethel Presbyterian Church and their successors in office forever, with the provision that whenever the land should cease to be used by the Presbyterians, then any minister of the Baptist or Methodist churches should have the privilege of using it as a place of worship. The consideration for the deed was "the respect the grantors have for the institution of Christianity, and that the said Bethel Church may have a suitable place for erecting a house of worship." At page 75 the court said: "But the grant in this case was not only in trust; it was also upon a condition subsequent that a church should, within a reasonable time, be erected upon the lot, and forever thereafter be used as a house of worship, pursuant to the intention of the grantor."

In *Grissom v. Hill, supra*, the conveyance was made for the purpose of promoting religion and morality, and was on the express condition that the lot was never to be sold or

to be used in any other way than for church purposes. That the trustees should carry out this object was the sole consideration for the grant. The court held that the trustees could not sell either directly or indirectly, and where the property was sold on decree foreclosing a mechanic's lien, the original grantor might recover possession.

In *First Universalist Society v. Boland, supra*, the deed provided that "when said real estate shall by the said Society or its assigns be diverted from the uses, interests and support aforesaid to any other interests, uses or purposes than as aforesaid, then the title of said Society or its assigns in the same shall forever cease and be forever vested in the following named persons." The court held that the grant was not on a condition subsequent, but that the deed created a determinable or qualified fee; that the limitation over was void for remoteness, and the land might revert to the grantor or his heirs on the determination of the estate granted.

In *Indianapolis, etc., R. Co. v. Hood, supra*, the land in question was conveyed to the railway company "for and in consideration of the permanent location and construction of the depot of said railway at Peru." This was the only consideration for the deed, and the court held that the breach of this condition subsequent worked a forfeiture of the railway company's estate, and rendered the property subject to be recovered back by the grantor or her heirs. It was also held that the condition subsequent was clearly expressed in the deed, although the word "condition" was not used therein.

In *Jeffersonville, etc., R. Co. v. Barbour, supra*, the conveyance recited that it was made "expressly for the use and purpose of depot grounds for the Madison and Indianapolis Railroad." After thirty-three years' use for such purpose, the railway company ceased to maintain a depot building thereon. The court held that the condition of the grant was that the grantee should locate and occupy the lots as depot grounds; that no time was mentioned, and that the language

of the deed strictly construed does not mean perpetuity, and that the time of the occupancy was a substantial compliance with the condition, and there could be no reversion.

In *Cleveland, etc., R. Co. v. Coburn, supra*, the land conveyed to the railway company was “ ‘for and in consideration of the advantages which may or will result to the public in general, and myself in particular, by the construction of the Indianapolis and Bellefontaine Railroad as now surveyed, or as the same may be finally located.’ ” The court said: “In determining the question whether the estate granted is one upon a condition subsequent, the court will seek to enforce the intention of the parties, to be gathered from the instrument and the existing facts. * * * We therefore think that the relinquishment in controversy created in the railway company an estate upon condition subsequent, liable to be defeated upon the nonperformance of the condition.”

It is a rule of general recognition that conditions subsequent in deeds are not favored in law, and are strictly construed. *Sumner v. Darnell* (1891), 128 Ind. 38, 43, 27 N. E. 162, 13 L. R. A. 173; *Elkhart Car Works Co. v. Ellis* (1888), 113 Ind. 215, 218, 15 N. E. 251; *Jeffersonville, etc., R. Co. v. Barbour, supra*; *Hunt v. Beeson* (1862), 18 Ind. 380, 382.

In *Scott v. Michael* (1891), 129 Ind. 250, 28 N. E. 546, it is held that where a deed will admit of two constructions, the one least favorable to the grantor is to be adopted;

5. that the deed must be construed so as to ascertain, if possible, the intention of the parties, and that “ ‘in trying to ascertain that intention, it is the duty of a court to assume, as nearly as possible, the position of the contracting parties, and to question the circumstances of the transaction between them, and then to read and interpret the words which they used in the light of those circumstances.’ ”

See, also, *Truett v. Adams* (1884), 66 Cal. 218, 5 Pac. 96.

It will be noted that the deed in the case at bar was exe-

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cuted for a consideration of \$320. This is the only consideration shown, and there is no proof or finding

6. that the consideration was not wholly adequate. The recital that the grant was in trust for the uses and purposes therein set out cannot be understood as creating a defeasible estate for the benefit of the grantor, but must be deemed to be directory to the *cestui que trust*. The recitals are insufficient to create a conditional estate. No technical words are used, which could be understood as creating a condition; no restraint was imposed on alienation, and there was no provision for forfeiture in event the property ceased to be used for church purposes. The trust provided for the doing of certain things without conditions expressed or inherent, except the implied condition of faithful performance on the part of the trustees, which might be enforced at the instance of the church, but not at the instance of the grantor. While the form of deed before us has not been construed by the Indiana courts, substantially the same deed has been passed on in other jurisdictions.

In the case of *Sellers Church Petition* (1891), 139 Pa. St. 61, 21 Atl. 145, 11 L. R. A. 282, the conveyance was to trustees and their successors in office forever. The consideration named was the sum of \$50, and there being no evidence that the lot was of a greater value, the court held that a presumption arose that the lot was sold and conveyed for its full money value. The court said: "The building and ground having now become inadequate for the purposes of the congregation, they ask for a decree authorizing their sale free from the trust, the proceeds to be applied to the purchase of other ground and the erection of another church building thereon. The original purpose of the trust is preserved, and a new building is to be erected for the use of the same beneficiaries, on another lot in the same town. There is nothing in the terms of the trust which confines the trustees to the particular piece of ground described, and there is no breach of the trust created by the deed, alleged or proved,

against the allowance of the petition for the sale, except the erection of another building on another lot of ground. Passing by the question of the status of the exceptant, who is the widow of one of the grantors and a member of the church, to be heard against the petition, we recur to the more important question whether the title to the land would be invalidated by its abandonment for church purposes. It has been so many times decided by this court that a conveyance of land to trustees for a charitable use does not create a conditional estate, but only a trust for the charitable use, not liable to be defeated by nonuser or alienation, in the absence of an express condition, that a mere reference to some of the authorities is sufficient. *Wright v. Linn* [1848], 9 Pa. St. 433; *McKissick v. Pickle* [1851], 16 Pa. St. 140; *Griffitts v. Cope* [1851], 17 Pa. St. 96; *Pickle v. McKissick* [1853], 21 Pa. St. 232; *Barr v. Weld* [1854], 24 Pa. St. 84; *Brendle v. Congregation* [1859], 33 Pa. St. 415; *Methodist Church v. Old Columbia Public Ground Co.* [1883], 103 Pa. St. 608.”

In *Baldwin v. Atwood* (1854), 23 Conn. 367, the land was conveyed in trust for the use and purposes therein mentioned to the grantees and their successors in office forever. It was provided that the trustees shall “at all times forever hereafter, permit such ministers and teachers, belonging to the Methodist Episcopal Church in the United States of America, as shall be duly authorized, from time to time, by the general conferences of the ministers and teachers of the said church or by the annual conference, authorized by the general conference to preach and expound God’s Holy Word, in the house or place of worship which has been erected on the said land, for the use of the members of said church.” The court said: “There is an entire absence of not only any technical words, which impart a condition, but of any language whatever which goes, in the least, to shew that any defeasible estate was intended to be created, unless such intention is deemed to be evinced merely by the cir-

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cumstance that the uses, for which the property is granted, are specified. But we have been referred to no case, and presume none can be found, where the mere declaration, in a grant, of the use to which the property shall be appropriated, has been held to import a condition. In this grant, moreover, it appears that it was made for a valuable consideration, proceeding from the grantees, or those for whose use it was made, and it is quite plain that it was made for the benefit of the latter, exclusively, and not that of the grantor."

In *Fair v. Trustees, etc.* (1899), 57 N. J. Eq. 496, 42 Atl. 166, the right of the congregation to sell the old church site, and with the proceeds derived therefrom to build a new and larger church at a different location was questioned. The heirs of the grantor in that case, as in this, insisted that on a sale of the property, title would revert. The court said: "I am satisfied that the trusts were declared entirely for the benefit of the church association, and their effect is simply to prevent the appropriation of the property conveyed to any purposes other than those specified in the deed. The trusts were strictly in accordance with the discipline of the church at that time, and it follows that the legal title, wherever it was held, was so held for the benefit of the unincorporated association known as the Bloomingdale Methodist Episcopal Church, and that that association, by and with the consent of the proper church authorities, and acting always in strict accordance with the discipline of the church, was empowered to make a conveyance of the church property."

In *Adams v. First Baptist Church, etc.* (1907), 148 Mich. 140, 111 N. W. 757, 11 L. R. A. (N. S.) 509, 12 Ann. Cas. 224, the property was devised to the church "to be used as a parsonage and nothing else, and to be kept for that purpose and used for nothing else." The words of the deed were held not to create a condition.

In *Strong v. Doty* (1873), 32 Wis. 381, substantially the

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same form of deed used in the case at bar was construed, where the same claim of forfeiture on condition broken was raised. The court said: "There is no provision in the deed, that if the premises be abandoned as a place of worship the title shall return to and become vested in the donors. No subsequent violation of the trust upon which the property was held can ever revest either the legal or equitable title in them; although a palpable breach of trust might form a proper ground for an application to a court of equity, on the part of the parties interested, to compel a due execution of the trust."

In *Neely v. Hoskins* (1892), 84 Me. 386, 24 Atl. 882, there was a provision in the deed that the property should be forever held for the use of the Protestant Episcopal Church at Old Town. The grantor was one Wadleigh, who on sale of the property claimed a reversion. The court said: "Undoubtedly the deed contains a condition for the benefit of the parish, but not for Wadleigh's benefit. It operates between the parish and the Bishop, and is not available otherwise. Every trust implies a condition that the trustee will faithfully administer the trust. Equity would enforce this trust at the instance and for the benefit of the parish. But the heirs of Ira Wadleigh could not complain. *Sohier v. Trinity Church* [1871], 109 Mass. 1." See, also, *Packard v. Ames* (1860), 16 Gray 327; *Farnham v. Thompson* (1885), 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59; *Kilpatrick v. Graves* (1875), 51 Miss. 432; *Rawson v. Inhabitants, etc.* (1863), 7 Allen (Mass.) 125, 83 Am. Dec. 670; *Brown v. Caldwell* (1883), 23 W. Va. 187, 48 Am. Rep. 376.

On the foregoing well-considered cases, we are constrained to hold that the words used in the deed to appellees' predecessors in trust do not import a condition subsequent for the violation of which a forfeiture or reversion would result. We think the clear and manifest purpose of the conveyance in the form it was made was that the provisions of the trust might be executed according to the rules and discipline of

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the church, and not for the benefit of the original grantors or their heirs.

The findings of the court were fully sustained by the evidence, and there was no error in the court's conclusion of law on the facts found.

The judgment is affirmed.

Hottel, C. J., Ibach, Myers, Felt and Lairy, JJ., concur.

NOTE.—Reported in 98 N. E. 657. See, also, under (1) 2 Cyc. 603; 38 Cyc. 1388; (2) 38 Cyc. 1375, 1378; (3) 38 Cyc. 1378; (4) 13 Cyc. 689; (5) 13 Cyc. 601, 609; (6) 13 Cyc. 687, 689. As to deeds for school, church or cemetery sites and appropriate restrictions, see 95 Am. Rep. 224. As to the breach of a condition subsequent in a deed and whether it reverts the property *ipso facto*, see 93 Am. St. 572. For a discussion of words merely declaratory of the purpose or consideration of a conveyance or devise as creating a conditional estate, see 3 Ann. Cas. 38; 12 Ann. Cas. 227.

EVANSVILLE AND SOUTHERN TRACTION COMPANY v. MONTGOMERY ET AL.

[No. 7,600. Filed May 31, 1912.]

1. STREET RAILROADS.—*Negligence.—Proximate Cause.—Complaint.—Sufficiency.*—A paragraph of complaint in an action against a street car company to recover for the value of a horse killed by the falling of one of defendant's posts, which alleged that defendant, knowing the rotten and decayed condition of the post, and that it was dangerous to travelers carelessly and negligently permitted the same to stand in the highway in such rotten and decayed condition, and that plaintiffs' horse was killed solely by reason of said negligence of defendant, sufficiently showed the negligence of defendant to be the proximate cause of the injury without alleging that the post fell by reason of such rotten and decayed condition. p. 530.
2. JUDICIAL NOTICE.—*Result of Operation of Natural Forces.*—The court knows that it is a natural result of the maintenance of a decayed and rotten post for such post to fall. p. 532.
3. NEGLIGENCE.—*Elements.*—To constitute actionable negligence, there must be a duty owing by the defendant to the plaintiff, a breach of that duty, and an injury to plaintiff resulting therefrom. p. 532.

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4. **NEGLIGENCE.—Proximate Cause.—Complaint.—Sufficiency.—Motion to Make Specific.**—A complaint in a negligence case averring that the negligence pleaded caused the injury complained of, without specifically showing a causal connection between the negligence and the injury, may be properly subject to a motion to make more specific, but, in the absence of such motion, is sufficient to withstand a demurrer. p. 532.
5. **STREET RAILROADS.—Operation.—Negligence.—Complaint.—Sufficiency.**—In an action against a street car company, a paragraph of complaint which charged negligence on the part of defendant in so operating its car as to frighten plaintiffs' horse, causing it to run against a rotten and decayed post, which fell and killed the horse, was a sufficient statement of actionable negligence. p. 533.
6. **STREET RAILROADS.—Maintenance.—Injury to Animals.—Evidence.**—In an action for the value of a horse killed by the falling of a decayed post which the defendant had maintained for the support of its trolley wire, evidence that other posts of the defendant of the same kind, the same size put into position at the same time in the same character of soil and equally exposed to the elements near to the one which fell and killed the horse had previously fallen and that defendant had removed others more than half rotten, was properly admitted as showing defendant's knowledge of the dangerous character of posts in that immediate locality. p. 533.
7. **STREET RAILROADS.—Maintenance.—Injury to Animals.—Evidence.—Sufficiency.**—Evidence that plaintiffs' horses became frightened at a street car and one of them came in contact with a post maintained by defendant for the support of its trolley wire, that the impact was slight, that the post was rotten and because of its rotten condition fell and killed the horse, and that defendant knew of the rotten condition of posts in that immediate locality, was clearly sufficient to support a verdict for plaintiffs in an action to recover the value of such horse. p. 533.
8. **STREET RAILROADS.—Maintenance.—Duty.**—A street railroad company owes a duty to travelers on a highway to maintain posts which will not fall because of their rotten and decayed condition when there is a slight impact against them from an outside force. p. 534.

From Vanderburgh Circuit Court, *Curran A. DeBruler*, Judge.

Action by John Montgomery and another against the Evansville & Southern Traction Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

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Woodfin D. Robinson and William E. Stilwell, for appellant.

Fred M. Hostetter and William D. Hardy, for appellees.

IBACH, J.—This was an action by appellees against appellant to recover the value of a horse killed by the falling of one of appellant's posts.

Error is assigned in overruling the demurrers to the first and second paragraphs of complaint, and in overruling the motion for a new trial.

The first paragraph of complaint alleges that appellant corporation operates a system of street-cars on a certain highway near the city of Evansville; that the overhead feed wire which supplies power for this line is supported by posts set near each side of said highway, and there maintained by defendant; "that on said March 4, 1909, employes of plaintiffs were conducting through and along said highway a number of plaintiffs' horses, when one of said posts and the wires thereunto attached fell, and struck and killed one of said horses; that said post was set in said public highway about four feet from the side thereof, and was rotten and decayed, and in a condition dangerous to travelers on said highway, and that defendant had long known that said post was rotten and decayed and in said dangerous condition; that defendant carelessly and negligently permitted said post to stand in said public highway in said rotten and decayed condition, and that plaintiffs' said horse was killed solely by reason of said negligence of the defendant, and without fault or negligence of the plaintiffs."

It is objected that this paragraph does not show a causal connection between the negligence charged and the injury. that the negligence charged is the maintaining of a post in a rotten and decayed condition, and it is not alleged that the post fell by reason of such rotten and decayed condition.

In the case of *Island Coal Co. v. Clemmitt* (1897), 19 Ind.

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App. 21, 49 N. E. 38, the court considered a complaint very like the present in essential features, and to which a like objection was made. There it was charged that the defendant carelessly and negligently placed a pile of refuse coal along the side of the public highway, that the nature of such refuse coal is to take fire and burn at and near the bottom and along the sides of the pile, and after so burning, large portions slide down the sides, and the sliding of a large amount of such refuse, by reason of said burning, caused plaintiff's horse to run away, injuring plaintiff. It was argued that the negligence attributed to the defendant was the placing of the material, that the cause of the horse's fright was the burning and falling of the material, and therefore the injury was not traceable to the defendant's negligence as a proximate cause. The court said: "If the injurious consequence averred cannot be said to appear to have accrued as an inevitable result of appellant's alleged act, it may be said to be shown to have been a natural result, which might reasonably have been expected as a possible effect. * * * It may reasonably be understood from the pleading that the appellant placed and maintained this rubbish in the designated place knowing its dangerous quality and effect. If the words 'careless' and 'carelessly' and 'negligent' and 'negligently,' as used, may be said to have reference, by strict grammatical construction, to the piling of the material in the designated place, still they refer to the making of a pile composed of material of the known dangerous quality, by reason of which the appellee was injured; and the entire pleading shows that the appellant was negligent in producing a condition of things through which, as a natural result, the appellee suffered the injury charged. * * * It is sufficiently shown that there was a want of due care for the safety of persons rightfully using the highway, and a negligent exposure of such persons to peril from the cause through which the appellee was injured. The court did not err in overruling the demurrer."

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This court knows that it is a natural result of the
2. maintenance of a decayed and rotten post for such
post to fall, and we think the reasoning of the opinion
in *Island Coal Co. v. Clemmitt*, *supra*, entirely applicable to
the present case.

The complaint in the case of *Indianapolis, etc., Tel. Co. v. Sproul* (1912), 49 Ind. App. 613, 93 N. E. 463, was very similar to the present one, the objection there being made that no connection was shown between the knotty and defective and weakened and rotted condition of the cross-arm, and its breaking. It was there said, and it has often been held by the Supreme Court and this court, that "so far as the question of proximate cause is concerned, the averment that the negligence specified caused the injury complained of is sufficient." See, also, *Baltimore, etc., R. Co. v. Peterson* (1901), 156 Ind. 364, 59 N. E. 1044; *Chicago, etc., R. Co. v. Stephenson* (1904), 33 Ind. App. 95, 98, 69 N. E. 270; *Greenawaldt v. Lake Shore, etc., R. Co.* (1905), 165 Ind. 219, 74 N. E. 1081.

Three elements are necessary to constitute actionable negligence: (1) A duty of the defendant towards the plaintiff;
(2) a breach of that duty; (3) an injury to plaintiff
3. from such breach. It was the duty of appellant in
the present case to maintain posts along the public
highway which would not fall because of their rotten and
decayed condition. It is charged that they were negligent
in maintaining posts in such rotten and decayed con-
4. dition that they were dangerous to travelers, and that
plaintiffs' horse was killed solely by reason of such
negligence on the part of defendants. This is a sufficient
pleading of proximate cause. Appellant might have moved
to make the complaint more specific, but in the absence of
such motion, the complaint is sufficient to withstand de-
murrer. *Indianapolis, etc., Traction Co. v. Newby* (1910),
45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36. See, also, *Evans-
ville, etc., R. Co. v. Krapf* (1896), 143 Ind. 647, 656, 36 N.

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E. 901, and cases cited; *Louisville, etc., R. Co. v. Thompson* (1886), 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Board, etc., v. Huffman* (1892), 134 Ind. 1, 31 N. E. 570.

The second paragraph of complaint charges negligence on the part of appellant in so operating its car as to frighten plaintiffs' horses, causing one of them to shy and run

5. against a rotten and decayed post by the side of the road, which post, when the horse came in contact with it, broke and fell and killed the horse. This paragraph sufficiently states actionable negligence in frightening plaintiffs' horse, and thereby causing its death, and is good against demurrer. It makes no attempt to charge negligence in maintaining the post in a dangerous condition.

Appellant objected to the admission of the testimony of certain witnesses that other posts near to the one which fell and killed the horse had fallen previously to its fall-

6. ing, and that the company had removed others "more than half rotten." It was shown that these were the same kind of posts, of the same size, put in position at the same time, in the same character of soil, and had been equally exposed to the elements. This evidence was proper as showing knowledge to the company of the dangerous character of posts in that immediate locality. *Western Union Tel. Co. v. Levi* (1874), 47 Ind. 552.

The evidence shows that appellees' employes were conducting horses for market along the highway in the customary manner used by horse buyers, when some of

7. them became frightened at the street-car. One of them came in contact with the post, either with his halter rope, or his body, and this post, being "rotten clear through" at the ground, fell because of such condition, and killed the horse. This pole was fourteen inches through and twenty feet high. The broken section was exhibited to the court. We think the evidence clearly sufficient to sustain a verdict. Appellant certainly owes a duty to travelers on a

highway to maintain posts which will not fall because
8. of their rotten and decayed condition if there is a slight impact against them from an outside force, and the evidence shows that only a slight impact was sufficient to throw down this post, and that appellant had notice of the dangerous character of posts in that immediate locality.

No error appearing, the judgment is affirmed.

NOTE.—Reported in 98 N. E. 731. See, also, under (1) 29 Cyc. 573; (2) 16 Cyc. 854; (3) 29 Cyc. 419; (4) 29 Cyc. 573; 31 Cyc. 644; (5) 36 Cyc. 1573; (6) 36 Cyc. 1590, 1591; (7) 36 Cyc. 1596; (8) 36 Cyc. 1497. As to the doctrine that there is no liability for negligence where there is no duty or privity, see 100 Am. St. 192. As to the duty of a street railway company to maintain its tracks so as not to imperil life and property, see 25 Am. St. 480.

METROPOLITAN LIFE INSURANCE COMPANY v. LYONS.

[No. 7,654. Filed May 31, 1912.]

1. **DEATH.—Presumption from Absence.—Statutory Provisions.—Scope.**—The provisions of §2747 Burns 1908, §2232 R. S. 1881, and §2748 Burns 1908, Acts 1883 p. 209, which create a presumption of death from one's absence from his usual place of residence for the space of five years relate exclusively to the settlement of the estates of absentees. p. 537.
2. **DEATH.—Presumption from Absence.—Common Law Rule.**—At common law a person is presumed to be living for seven years after his disappearance, and a presumption of death arises only from an unexplained absence for that length of time. p. 538.
3. **INSURANCE.—Life Insurance.—Presumption of Death.—Findings.**—A finding for plaintiff, in an action on an insurance policy, based on a paragraph of complaint counting on the absence of the assured from his usual place of residence for the space of five years, is contrary to law. p. 538.
4. **DEATH.—Presumptions.—Burden.**—Where one is shown to have been alive at a certain time, the presumption of life continues and the burden of proving that he is dead rests on the party asserting such fact. p. 538.
5. **DEATH.—Presumption from Absence.—Evidence.**—Proof of absence for seven years will not alone give rise to the presumption of death, but in addition to such absence it must be shown that

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the absent person left for a temporary purpose and has not returned and that those most likely to hear from him have received no word or tidings from him; and where the absentee established a residence abroad, the presumption of death will not arise from the fact that his family and friends have heard nothing from him for seven years unless it is also shown that due inquiry was made at the place of such residence and that no tidings of him could be obtained. p. 538.

6. **DEATH.—Proof of Death as a Fact.—Evidence.—Sufficiency.—**

Where it is necessary to prove the death of an absentee at a particular time short of the time required to establish the presumption of death, it may be shown by direct evidence or by proof of circumstances from which such death may be rightly and reasonably inferred, but not by facts and circumstances alone which would be sufficient only to create a presumption of death after the lapse of seven years. p. 539.

7. **INSURANCE.—Life Insurance.—Death of Assured.—Evidence.—**

Sufficiency.—Evidence, in an action on a life policy, showing that the insured, who was unmarried, had lived with his sister for about three years and that shortly after taking out the policy in suit for her benefit, he went to a distant city where he obtained employment, that the sister received letters from him regularly for a little more than a year, after which she received no further letters, but not showing anything as to his character, habits, affections, business or objects in life, although sufficient to raise the presumption of death after a lapse of seven years, was insufficient to warrant the court in finding the death of the insured as a fact within that period. p. 541.

8. **EVIDENCE.—Hearsay.—Declarations of Deceased Persons.—Ad-**

missibility to Prove Pedigree.—Hearsay evidence is admissible to prove pedigree which embraces facts as to birth, marriage and death, and the date when the events happened, as well as descent and relationship, but to render the declarations of deceased persons admissible to prove such facts it must be shown that the declarants were related by blood or marriage to the family of the person to whom the declarations relate. p. 543.

9. **DEATH.—Evidence.—Hearsay.—**The death of an individual,

though disconnected from any question of pedigree, and for whatever purpose sought to be established, may be proved by hearsay, subject to the same restrictions that are applicable in cases where matters of pedigree are involved. p. 544.

10. **DEATH.—Evidence.—Extent of Rule Admitting Hearsay.—**The

rule as to the admission of hearsay evidence to prove the death of an individual extends only to the general reputation in the family of such person and among his kindred. p. 544.

Metropolitan Life Ins. Co. v. Lyons—50 Ind. App. 534.

11. **EVIDENCE.—Hearsay.—Ground of Admissibility to Prove Pedigree.**—Hearsay evidence on matters of pedigree is admitted to prove remote facts in family history on the ground of necessity. p. 544.
12. **DEATH.—Evidence.—Hearsay.—Declaration by One Not Related to Family.**—In an action on a life policy, testimony of a witness that he and his deceased brother knew the insured and that the brother had told witness that the insured was drowned, was inadmissible because it did not appear that the declarant was a member of the insured's family or that he was related thereto by blood or marriage, and also for the reason that the fact of the insured's death was not one of such remote origin as to be known only by reputation and family tradition. p. 545.
13. **TRIAL.—Findings.—Incompetent Evidence.**—In an action on a life policy, where the only evidence of the death of the insured consisted of testimony that a deceased person, not shown to have been related to the family of the insured had stated that the insured was drowned, such evidence, although incompetent, was, in the absence of any objection to its admissibility, sufficient to sustain a finding that the insured had died. p. 546.

From Superior Court of Marion County (17,406); *Clarence E. Weir*, Judge.

Action by Catherine Lyons against the Metropolitan Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

W. H. H. Miller, C. C. Shirley and Samuel D. Müller, for appellant.

Thomas D. McGee, Edward D. Reardon and James H. Drew, for appellee.

LAIRY, J.—Appellee recovered a judgment on a policy of insurance issued by appellant on the life of Michael Broderick.

The complaint was in two paragraphs, and the only substantial difference between them is that the first paragraph avers that Michael Broderick died on or about July 1, 1903, while the second paragraph does not allege the death of Broderick, but avers that "on or about the ——— day of August, 1901, the said Broderick left the city of Indianapolis and went to the city of St. Louis in the state of Mis-

souri; that on or about the ——— day of January, 1903, the said Broderick left his usual place of residence and went to parts unknown and has absented himself from his usual place of residence ever since for a space of more than five years, and that he has not been heard of or seen by any one since.”

The only error assigned is the action of the trial court in overruling appellant's motion for a new trial; and the only questions presented by the brief of appellant are that the decision of the court is not sustained by sufficient evidence, and that the decision of the court is contrary to law.

To sustain the first paragraph of complaint the evidence must prove as a fact that the assured was dead before the commencement of the action; but to sustain the second paragraph it was not necessary to prove that such assured was in fact dead. Evidence showing that the assured had absented himself from his usual place of residence and gone to parts unknown for a period of five years would be sufficient to sustain the allegations of the second paragraph, provided the facts attending such disappearance and absence were such as to give rise to the presumption of death as provided by §§2747, 2748 Burns 1908, §2232 R. S. 1881, Acts 1883 p. 209.

Even though it be conceded that the evidence is sufficient to sustain every material allegation of the second paragraph of complaint, a verdict resting on that paragraph

1. could not be sustained, for the reason that such a verdict is contrary to law. This court has recently held that the sections of statute to which we have just referred relate exclusively to the settlement of the estates of absentees, and do not apply to a case such as the one we are now considering. *Connecticut Mut. Life Ins. Co. v. King* (1911), 47 Ind. App. 587, 93 N. E. 1046.

At common law a person was presumed to be living for seven years after his disappearance, and a presumption of death arose only from an unexplained absence for that

length of time. It was held in the case just cited that

2. the statutes under consideration do not change the common law in this regard, except in so far as the settlement of the estates of such absentees is concerned. In this case, therefore, proof of the unexplained absence of
3. the assured for five years would not be sufficient to authorize a presumption of death under the statutes relied on, and a finding in favor of the plaintiff on the second paragraph of complaint is contrary to law.

The only other question is the sufficiency of the evidence to sustain the decision on the first paragraph of complaint. If the evidence is sufficient to authorize the court to find as a fact that Michael Broderick was dead before the commencement of the action, or if the facts proved were sufficient to warrant an inference of such fact, then the decision can be sustained on this paragraph.

Where a person is shown to have been alive at a particular time, the presumption of life continues, and the burden of proving that he is dead rests on the party asserting

4. such fact. If the person alleged to be dead has been absent from his home for seven years, a presumption of death may arise, but proof of absence alone will not give rise to this presumption. If, in addition to the ab-
5. sence of such person for the required time, it is shown that he left for a temporary purpose of business or pleasure and that he had not returned, and that those most likely to hear from him have received no word or tidings from him, the presumption of death arises after an absence of seven years. *Thomas v. Thomas* (1884), 16 Neb. 553, 20 N. W. 846; *Brown v. Jewett* (1846), 18 N. H. 230.

If it is known, however, that he established a fixed residence abroad, proof that his family and friends have heard nothing from him for seven years will not be sufficient to establish the presumption of his death. In addition to this fact, it must be shown that due inquiry was made at the place where he had established such residence, and that no

tidings of him could be obtained. *Bailey v. Bailey* (1877), 36 Mich. 181; *Wentworth v. Wentworth* (1880), 71 Me. 72.

In some cases it becomes material to prove the death of such an absentee at some particular time within the seven years, or to prove the fact that he died before the 6. presumption would arise from absence. In such cases it is necessary to prove his death as a fact, and when this can not be done by direct evidence it may be shown by proof of circumstances from which such death may be rightly and reasonably inferred. A court or jury in such a case is not warranted in finding death as a fact from facts and circumstances in evidence which would be sufficient only to create a presumption of death after the lapse of seven years; but additional facts and circumstances may be shown which will warrant such a finding. Some authorities have held that in order to justify a finding of the death of an absent person it must appear that when last seen or heard from he was in a situation of particular peril calculated to shorten or destroy life.

In *Eagle's Case* (1856), 3 Abb. Pr. 218, it was said that if it was attempted to apply the presumption short of seven years, special circumstances would necessarily have to be proved; as for example, that at last accounts the person was dangerously ill or in a weak state of health; was exposed to great perils of disease or accident; that he embarked on a vessel which has not since been heard from, though the length of the usual voyage has long since elapsed. In all such cases the circumstances are sufficient to warrant the submission of the question of the fact of death to the determination of the court or jury trying such issue.

There are cases, however, which hold that circumstances other than that of particular peril calculated to destroy life may be sufficient to justify the inference of death. *Tisdale v. Connecticut Mut. Life Ins. Co.* (1868), 26 Iowa 170, 96 Am. Dec. 136; *John Hancock Mut. Life Ins. Co. v. Moore* (1876), 34 Mich. 41; *Supreme Tent, etc., v. Ethridge*

(1909), 43 Ind. App. 475, 87 N. E. 1049; *Lancaster v. Washington Life Ins. Co.* (1876), 62 Mo. 121; *Fidelity Mut. Life Assn. v. Mettler* (1901), 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922.

The case of *Tisdale v. Connecticut Mut. Life Ins. Co.*, *supra*, is a leading case on this point. The facts in that case are that the party on whose life the policy was issued was a married man about thirty years of age, of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends and the entire affections of his wife, and was living in apparent happiness, with no apparent cause of discontent with his conditions which would have influenced him to break the domestic and social ties which bound him so pleasantly to his home. In the statement of the case it was said: "Visiting Chicago, * * * upon business, he was last seen by an acquaintance on the corner of Lake and Clarke streets in that city, about 3 o'clock p.m. of that day. No trace of him was afterward discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for information that would lead to his discovery, either dead or in life. The detective police were employed to search for him without results. No tidings have been received of him, and not the faintest trace of the cause or manner of his disappearance has been discovered. He gave no intimation to any one of an intention to absent himself; and the latest declaration of his intentions was to the effect, that he expected to leave Chicago the day of his disappearance to join his wife at Dubuque. He owed no debts amounting to any considerable sum, and had made payment of some small ones about the day of his disappearance. His valise, containing clothing and other articles commonly carried by travelers, was found at his hotel. His bill there was unpaid." It was held by the Supreme Court, in reversing the

trial court, in that case that these facts were sufficient to warrant an inference of death. The court said in part: "Any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity and objects in life, which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence. A rule excluding such evidence would ignore the motives which prompt human actions, and forbid inquiry into them in order to explain the conduct of men."

We quite agree with the rule of law announced above, and the rule has been adopted by this court and applied in the case of *Supreme Tent, etc., v. Ethridge, supra*; but the rule is not applicable to the state of facts disclosed by the evidence in this case.

Michael Broderick, the assured in this case, was an unmarried man at the time he left Indianapolis in the spring or early summer of 1901. Prior to that time he had
7. been living with a married sister, Mrs. Catherine Lyons, in the city of Indianapolis for about three years, and had taken out the insurance policy in suit, in which she was named as beneficiary, about three months before he left. Mrs. Lyons paid the premiums until the commencement of this action. He left Indianapolis to go to St. Louis to work, because he believed that he could get better wages there. The evidence does not show that he ever intended to return to Indianapolis to reside. He obtained employment in St. Louis, and his sister in Indianapolis received letters from him regularly in response to those written by her until the fall of 1902, after which she received no further letters from him, and letters mailed to him at his former address were returned undelivered. In June or July of 1902 he came back to Indianapolis to see a sister, who had recently come over from Ireland. He stayed a few days on a visit, and then returned to St. Louis, after

which Mrs. Lyons received one letter and one postal card from him. His mother came over from Ireland in 1903, and went to the home of her daughter in Indianapolis, but she never saw her son Michael nor heard from him after she reached this country. Michael Broderick had two brothers and two sisters beside Mrs. Lyons, but it is not shown that any of his relatives received any letters from him except his mother and Mrs. Lyons. His mother testified that she received a letter from him the spring before she left Ireland, informing her that he was making money, and offering to send her money to pay her way over. This he never did, and it is not shown that he was contributing anything to the support of any relative. In 1905 Mrs. Lyons heard that her brother Michael was dead, and she went to St. Louis in that year and made an extended investigation, but was unable to learn anything of his whereabouts.

While the facts shown in this case would be sufficient, after a lapse of seven years, to raise the presumption of death, there are no special circumstances from which death may be inferred as a fact within the doctrine of the case of *Tisdale v. Connecticut Mut. Life Ins. Co.*, *supra*. In this case the assured was not temporarily away from his family on business or pleasure at the time they lost trace of him, but he had been employed in St. Louis for eighteen months from that time. It was not shown that he had expressed any immediate intention of returning to Indianapolis, or that there was anything sudden or mysterious in his disappearance. On ceasing to hear from him, no immediate search was made to ascertain his whereabouts, the only effort to find him being made two or three years later. Nothing is shown as to his character, his habits, his affections, his attachments or his business and objects in life. We think that the evidence on this branch of the case is not sufficient to warrant the court in finding the death of the assured as a fact.

It is claimed by appellee that there is some direct evi-

dence of the death of Michael Broderick. We are referred to the testimony of Jeremiah Sullivan, who testifies that he knew Michael Broderick; that his brother Pat Sullivan was in St. Louis, and knew Broderick while there; that this brother was at Indianapolis on a visit in 1902, and told the witness that Broderick was drowned in St. Louis. Witness did not ask when or how Broderick was drowned, and his brother did not give him any of the details of his death and did not tell him how he obtained the information. This brother came back to Indianapolis and died about a year later. If this evidence is competent, it tends to establish the death of Broderick prior to 1902.

The evidence of Jeremiah Sullivan as to the facts stated to him by his brother is hearsay, and is incompetent, unless it falls within some of the exceptions to the rule excluding hearsay evidence. Hearsay evidence is admissible to

8. prove pedigree, and this embraces not only descent and relationship, but also facts as to birth, marriage and death, and the date when the events happened. These facts may be proved by the declarations of deceased persons, who are shown to have been related by blood or marriage to the family of the person to whom the declarations relate. Such evidence is admitted on the ground that the reputation in the family as to such a fact, being a part of the family history, is admissible.

In some jurisdictions the rule is that hearsay evidence on questions of pedigree is admissible only in cases where some matter of pedigree is the direct subject of the suit; but in this State and in many other states it has been held that such declarations as to facts of family history are admissible, not only in litigation where the issue on which the evidence is offered directly involves a question of descent as pedigree, but also in cases where the question of pedigree is not directly involved. *Collins v. Grantham* (1859), 12 Ind. 440; 1 Elliott, Evidence §370 and cases cited.

The weight of authority in this country seems to establish

the rule that the death of an individual, though disconnected from any question of pedigree and for what-

9. ever purpose sought to be established, may be proved by hearsay, subject to the same restrictions that are applicable in cases where matters of pedigree are involved. In order to render the declarations of a deceased person competent as to the death of an individual, it must appear that the declarant was a member of the family of the person whose death is the subject of inquiry, or that he was related to such family by blood or marriage. Accordingly it has been held that common reputation in the family of a person alleged to be dead is competent evidence of the death of such person, as well as of the time when such death occurred. *Morrill v. Foster* (1856), 33 N. H. 379; *American Life, etc., Co. v. Rosenagle* (1875), 77 Pa. St. 507; *Mason v. Fuller* (1872), 45 Vt. 29.

The rule as to the admission of hearsay evidence to prove the death of an individual extends only to the gen-
10. eral reputation in the family of such person and among his kindred. *Anderson v. Parker* (1856), 6 Cal. 197; *Dupont v. Davis* (1872), 30 Wis. 170.

• In one case the rule was relaxed when it appeared that the deceased had no known kindred. In that case, reputation among the acquaintances of the person alleged to be dead was admitted. *Ringhouse v. Keever* (1869), 49 Ill. 470.

The declarations of persons not members of the family of the person whose death is the subject of inquiry are not competent to prove the death of such person. *Jackson v. Browner* (1820), 18 Johns. 37; *Dudley v. Grayson* (1827), 6 Monroe (Ky.) 259; *Wilson v. Brownlee, Homer & Co.* (1867), 24 Ark. 586, 91 Am. Dec. 523.

Hearsay evidence on matters of pedigree is ad-
11. mitted to prove remote facts in family history, on the ground of necessity. 1 Elliott, Evidence §362 and cases cited.

When an occurrence has taken place in a family, such as a marriage, a birth, a death, or any other fact in reference to lineage or pedigree, and when members of the family afterwards speak of such facts and make declarations in reference thereto, such declarations so made are admissible after the death of the person making them to prove such facts. Such evidence generally pertains to remote facts which cannot be proved by living witnesses, and tends to prove the tradition and history of the family as to such facts.

The testimony of the witness Jeremiah Sullivan, as to the declaration of his brother, does not fall within the rule which permits hearsay evidence as to pedigree, for 12. two reasons: The first reason is that it does not appear that the declarant was a member of the family of Michael Broderick, concerning whose death the declaration was made, or that he was related to the family either by blood or marriage.

The second reason is that the fact concerning which the declaration was made was not one of remote origin and which was known only by reputation and family tradition. If Michael Broderick was dead, his death occurred so recently that all of the facts and circumstances tending to establish it were known to the members of his family who were living and who testified at the trial of this case. Under such a state of circumstances it has been held that it is not competent to prove a general reputation or belief in a family that one of its members is dead. *Vought v. Williams* (1887), 46 Hun 638; *Fidelity Mut. Life Assn. v. Mettler*, *supra*.

In the case last cited it was held that proof that there was a general belief and repute in the family of the assured to the effect that he was dead was not competent to establish the fact of his death. Speaking on the subject the court said: "But we do not think the evidence was competent to

establish the fact of death, under the circumstances of the case. To illustrate: in *Scott v. Ratliffe* [1831], 5 Pet. *81, [8 L. Ed. 54], it was held that the testimony of a witness that 'she was told that Mr. Madison was dead,' was admissible; and in *Secrist v. Green* [1865], 3 Wall. 744, 751, [18 L. Ed. 153], it was said 'it is competent to prove death and heirship by reputation.' But these and similar rulings and expressions in other cases must be taken in connection with the particular facts and circumstances. In this case no question of pedigree; of birth, marriage, or death as bearing on legitimacy, descent, or relationship; of ancient rights; of past events prior to controversy, was involved; nor was there any pretence that this was evidence of tradition, or historical fact, or general reputation in the community participated in by the family. If evidence of death it would be evidence of the particular fact on which recovery was sought, and inadmissible as such.'

The testimony of Jeremiah Sullivan, as to what his brother told him in reference to the death of assured, is hearsay, and does not fall within any of the recognized exceptions to the rule excluding such evidence.

If a proper objection had been made seasonably, this testimony should have been excluded; but this question is not saved or presented on this appeal. The record shows

13. that this testimony was admitted without objection, and the question now arises as to whether or not hearsay evidence, which, on proper objection, should have been excluded, will be held sufficient to sustain a verdict or decision which is otherwise unsupported by evidence. If the evidence of Jeremiah Sullivan as to the statement of his brother tends to prove that Broderick died prior to the year 1902, then the weight of such evidence was for the court trying the issue of fact, and a finding of such death, based on such testimony, cannot be disturbed on appeal; but if such hearsay evidence is entirely without probative force, a verdict resting thereon cannot be upheld.

On the question just stated there is a conflict of authority in this country. The weight of authority seems to establish the rule that verdicts resulting from hearsay testimony may be sustained, where that evidence is permitted to go to the jury without objection. Its probative force under such circumstances being for the court or jury trying the issue of fact. *Sheibley v. Nelson* (1909), 84 Neb. 393, 121 N. W. 458; *Damon v. Carrol* (1895), 163 Mass. 404, 40 N. E. 185; *State, ex rel., v. Cranney* (1902), 30 Wash. 594, 71 Pac. 50; *Goodall v. Norton* (1902), 88 Minn. 1, 92 N. W. 445; *Meyer v. Christopher* (1903), 176 Mo. 580, 75 S. W. 750; *Struth v. Decker* (1905), 100 Md. 368, 59 Atl. 727; *Metz v. Chicago, etc., R. Co.* (1911), 88 Neb. 459, 129 N. W. 994; *Kimmerle v. Farr* (1911), 189 Fed. 295, 111 C. C. A. 27; *Schlemmer v. Buffalo, etc., R. Co.* (1907), 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681.

On the other hand, a number of courts adhere to the rule that ordinary hearsay testimony is not only inadmissible, but wholly without probative value, and its introduction without objection does not give it any weight or force whatever in establishing a fact. *Eastlick v. Southern R. Co.* (1902), 116 Ga. 48, 42 S. E. 499; *State Bank v. Woody* (1850), 10 Ark. 638; *Lehman v. Frank* (1897), 46 N. Y. Supp. 761, 19 App. Div. 442.

The precise question here under consideration has never been passed on by either the Supreme or Appellate Courts of this State, but both courts frequently have held that secondary evidence, when admitted without objection, is sufficient to sustain a verdict. *Stockwell v. State, ex rel.* (1885), 101 Ind. 1; *Littler v. Robinson* (1906), 38 Ind. App. 104, 77 N. E. 1145; *Moore v. Hubbard* (1896), 15 Ind. App. 84, 42 N. E. 962; *Hommell v. Gamewell* (1838), 5 Blackf. 5; *Schenck v. Butsch* (1869), 32 Ind. 338.

In the case of *Stockwell v. State, ex rel., supra*, the court said: "It is next contended that the judgment should be reversed because the evidence does not show title in Har-

grove at the time he made the mortgage, and it is asked, with some emphasis, whether this court will hold, that title to real estate may be established by the affidavit of a party claiming to own it. To that inquiry we very readily answer, no, if any objection be made to such evidence. But if the parties will agree to waive the production of the proper evidence, and agree that such evidence shall take its place as competent evidence, then we know of no reason why the appellate courts should interfere and overthrow judgments and involve increased costs to the parties and to the public, because on such agreement the best evidence was not brought forward.”

“Parties have an undoubted right to try their case on illegal evidence, if they so desire; and if illegal evidence is admitted without objection, it is the right and duty of the jury to give it such consideration as it would be entitled to if legal evidence.” *Birmingham R., etc., Co. v. Wildman* (1898), 119 Ala. 547, 24 South. 548.

If a party desires to make an objection of any kind to the admissibility of evidence, he should do so at the proper time. If the evidence is excluded, the party offering it may be able to supply the defect by other proof. It is not uncommon for testimony to be given which is not, in its nature, strictly competent on matters about which both parties realize there is no dispute. Such evidence is taken because the adverse party makes no objection, and there is no question as to the fact it tends to prove. He cannot after verdict obtain a new trial on the ground that the fact was not proved, because the evidence received in support of it was incompetent and should have been rejected on proper objection. The same rule holds good where incompetent or illegal evidence is admitted without objection to prove a fact in dispute. The party against whom such evidence is introduced may not take his chance of obtaining a favorable verdict at the hands of a jury on the evidence so admitted, and then, after an adverse verdict, obtain a new trial on the

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ground that the verdict does not rest on any competent evidence.

The evidence of the witness Jeremiah Sullivan, although incompetent, tended to prove that the assured died prior to the year 1902. We cannot say, therefore, that the decision of the court is not sustained by sufficient evidence.

The court did not err in overruling appellant's motion for a new trial.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 824. See, also, under (1) 13 Cyc. 299; 1913 Cyc. Ann. 1584; (2) 13 Cyc. 298; (4) 13 Cyc. 295; (5) 13 Cyc. 300, 301, 305; (6) 13 Cyc. 303, 307; (7) 13 Cyc. 305, 307; 25 Cyc. 945; (8) 16 Cyc. 1223, 1229; (9) 13 Cyc. 306; (11) 16 Cyc. 1224; (12) 13 Cyc. 306. As to the presumption of death generally and the burden of proof in rebuttal, see 104 Am. St. 198. As to the facts which must be shown in connection with absence to establish a presumption of death, see 7 Ann. Cas. 573; 14 Ann. Cas. 242.

ATLAS ENGINE WORKS ET AL. v. FIRST NATIONAL BANK OF SEYMOUR.

[No. 7,556. Filed March 13, 1912. Rehearing denied May 31, 1912.]

1. **COMPOSITIONS WITH CREDITORS.**—*Pleading.*—*Answer.*—*Presumption as to Signing Agreement.*—In an action on a promissory note, where an answer was based on an alleged written composition agreement with defendant's creditors, but failed to aver that plaintiff signed such agreement, the presumption is that plaintiff did not do so. p. 552.
2. **COMPOSITIONS WITH CREDITORS.**—*Form.*—*Requisites.*—A composition agreement is not required to be in writing. p. 552.
3. **COMPOSITIONS WITH CREDITORS.**—*Written Agreement.*—*Effect as to Creditor Not Signing.*—Where a written composition agreement is not signed by one of the creditors, it may still be binding upon him if he either directly or indirectly agreed with the other creditors that he would settle his claims against their common debtor on the terms and under the conditions thereof. p. 552.
4. **COMPOSITIONS WITH CREDITORS.**—*Secret Preferences.*—*Effect.*—Where a creditor, who has not signed a composition agreement, agreed to settle with the debtor upon the terms and conditions

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thereof, and the creditors signing the agreement are thereby induced to make a settlement on its terms in the belief that he is settling on the same terms, any secret arrangement with the debtor whereby he is to obtain an advantage over the other creditors is such fraud as vitiates the whole agreement; but where he has in no way agreed to abide by the terms of such agreement, he may proceed to settle his claim in his own way and is permitted to retain any advantage he may obtain thereby. p. 553.

5. COMPOSITIONS WITH CREDITORS.—*Agreement.—Consideration.—*

The consideration on which a composition agreement rests consists of the mutual promises between the creditors themselves, whereby they each agree for the benefit of all to forego some right which they might enforce against their common debtor. p. 553.

6. COMPOSITIONS WITH CREDITORS.—*Parol Agreement.—Pleading.—*

Answer.—Counterclaim.—Sufficiency.—In an action on a promissory note, where defendants contended that it was void as being a secret preference over other creditors under a written composition agreement, a paragraph of answer and a counterclaim alleging that plaintiff was requested to grant defendant an extension of time and accept notes for defendant's indebtedness under and in accordance with such agreement, and that plaintiff refused to do so without having and receiving an advantage over such other creditors, but which failed to allege that plaintiff had signed such agreement, were each insufficient to show that plaintiff had entered into the composition agreement by parol, in the absence of averments that the settlement with any other creditor depended upon or was made on the faith of the settlement with plaintiff or that any of the other creditors were influenced thereby. p. 554.

From Superior Court of Marion County (78,355); *James M. Leathers*, Judge.

Action by the First National Bank of Seymour, Indiana, against the Atlas Engine Works and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Newman Northrop, Levinson & Becker, Chester E. Cleveland and Edmund B. Walker, for appellants.

Charles F. Remy and James M. Berryhill, for appellee.

LAIRY, J.—This appeal is prosecuted from a judgment rendered in favor of appellee on a note alleged to have been

executed by appellants. The complaint was in two paragraphs, the first charging that appellants jointly executed the note and the second alleging that it was executed by the Atlas Engine Works as principal and Hugh H. Hanna as surety. No question is raised as to the sufficiency of the complaint. The defendants filed a joint and several answer, to which a demurrer was sustained, and the Atlas Engine -Works filed a counterclaim, to which a demurrer was also sustained. The defendants refused to amend or plead further, and judgment was rendered for plaintiff. The errors assigned and relied on call in question the correctness of the ruling of the trial court in sustaining the demurrers to these pleadings.

Appellants claim that the facts stated in their answer show that the note sued on is void, for the reason that it was executed in pursuance of a composition agreement entered into between the Atlas Engine Works and its creditors, of which the appellee was one, and that as a condition to entering into such agreement, appellee required of the debtor, and the debtor gave to appellee, a secret preference and advantage over the other creditors of said Atlas Engine Works, who were parties to such agreement, and who had no knowledge of the secret advantage obtained by appellee.

From the averments of the answer it appears that in the year 1907 the Atlas Engine Works was a manufacturing corporation, having an extensive business, and that it had become largely indebted to numerous persons and corporations, in the aggregate amount of more than \$2,000,000, a large part of which was due, and that for want of available funds it was unable to meet or pay said indebtedness as it matured, and that if its creditors had insisted on the payment of their debts as they severally became due it would have been forced into bankruptcy or into the hands of a receiver, and its property would have been sacrificed and the creditors would have received much less than the face of their several claims.

It is further averred that the Atlas Engine Works opened negotiations with its creditors with a view to obtaining the necessary extension of time, and that a certain composition agreement was entered into with substantially all of its creditors, whereby it was agreed that its indebtedness should be extended and come due in five instalments, as therein specified; that notes of the Atlas Engine Works were to be executed for said instalments, falling due six, nine, twelve, eighteen and twenty-four months after date, respectively, which the creditors were to accept, and cancel and surrender the indebtedness due to them respectively and the evidence thereof.

This agreement is in writing, and is filed as an exhibit to the answer, but it is not averred that appellee signed it. An examination of the contract shows that it purports to be entered into by those who sign it. Following the introductory part of the agreement, this statement occurs: "Now, therefore, the undersigned firms, individuals and corporations hereby covenant and agree with each other as follows, viz:"

after which follow the various provisions of the agree-

1. ment. As it is not averred that appellee signed this written agreement, the presumption is that it did not do so. It cannot be said that appellee would be bound by this agreement, or that it would be a party to the composition, unless it appears from the other averments of the answer that it agreed with the other creditors of the Atlas

Engine Works to be bound by its terms. A composi-

2. tion agreement is not required to be in writing, and such an agreement, though resting in parol, is valid. *Chemical Nat. Bank v. Kohner* (1881), 85 N. Y. 189; *Browne v. Stackpole* (1838), 9 N. H. 478; *Mellen v. Goldsmith* (1879), 47 Wis. 573, 3 N. W. 502, 32 Am. Rep. 781.

Even though the written contract was not signed by

3. appellee bank, it might become binding upon it if it agreed, either directly or indirectly, with the other

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creditors that it would settle its claim against their common debtor on the terms and under the conditions of the written agreement. If appellee did so agree with the other

4. creditors, and they were thereby induced to make a settlement on the terms of the written contract, believing that appellee was settling on the same terms, and if appellee had made a secret arrangement with the debtor, whereby he obtained an advantage over the other creditors, this would be such a fraud as would vitiate the whole agreement. The notes given to consummate the agreement would be void, and the debtor would be in a position to make the defense on the ground of fraud, it being held in such a case that he is not *in pari delicto*. *Shinkle v. Shearman* (1893), 7 Ind. App. 399, 34 N. E. 838; *Morrison, Plummer & Co. v. Schlesinger* (1894), 10 Ind. App. 665, 38 N. E. 493; *McFarland v. Garber* (1858), 10 Ind. 151. The debtor may also, under such circumstances, recover any money or other thing of value given as such preference. *Brown & Franklin v. Everitt Ridley Ragan Co.* (1900), 111 Ga. 404, 36 S. E. 813; *Bean v. Brookmire & Rankin* (1873), 2 Dillon 108, Fed. Cas. No. 1170; *Crossley v. Moore* (1878), 40 N. J. L. 27.

On the other hand, an agreement for composition may be entered into by a part of the creditors of an insolvent debtor, and in such a case it will be binding on those only who enter into it. In such a case the creditors who do not enter into the agreement may proceed to collect or to settle their claims in their own way. If such a creditor makes a better settlement than those who agree to the composition, or obtains any other advantage, he will be permitted to retain it. It could not be said that any creditor had been induced to make a settlement on any promise or agreement of another creditor who did enter into the agreement. The considera-

tion on which a composition agreement rests does not

5. pass between the creditor and the common debtor.

The consideration which upholds such agreements is

the mutual promises between the creditors themselves, whereby they each agree for the benefit of all to forego some right which they might enforce against their common debtor.

Counsel for appellant insist that the facts pleaded in both the answer and the counterclaim are sufficient to show

•that appellee entered into the composition agreement

6. by parol. The facts alleged in these pleadings and relied on by appellants to show such parol agreement are as follows: The First National Bank of Seymour, Indiana, was requested to grant it an extension in the same manner as its other creditors, and to come in under said extension agreement and accept notes for its indebtedness under and in accordance with said extension agreement, but said First National Bank of Seymour refused to give to said Atlas Engine Works an extension, and to come in under said extension agreement upon an equality with and on the same terms as the other creditors, but insisted on having and receiving an advantage over the other creditors before it would accept and come in under said extension agreement.

It appears from these averments that the agreement which appellee entered into was made solely with the debtor. It does not appear that it was based on any agreement made or understanding had between appellee and any other creditor, or that the settlement with any other creditor depended upon or was made on the faith of the settlement with appellee. It is not even shown by any averment that any of the other creditors of the Atlas Engine Works had any knowledge of the existence of the claim of appellee, or of the settlement made with it, or that any of such creditors were influenced by such settlement, and induced to make a settlement of their claims on what they supposed to be a like basis.

It will be seen that the averments of both the answer and the counterclaim fall far short of showing any relation of trust and confidence between appellee and the other creditors of the Atlas Engine Works. Having entered into no

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agreement, either directly or indirectly, with the other creditors, appellee was at liberty to settle with its creditor on any terms agreed on between them, and such settlement is not fraudulent as to the other creditors. If such settlement is not fraudulent as to other creditors, it necessarily follows that it is not fraudulent as between the debtor and creditor.

The demurrer was properly sustained to both the answer and the counterclaim.

Judgment affirmed.

NOTE.—Reported in 97 N. E. 952. See, also, under (1) 8 Cyc. 460; (2) 8 Cyc. 423; (3) 8 Cyc. 448; (4) 8 Cyc. 468; (5) 8 Cyc. 419. For a discussion of the validity of a note or other security given as a secret preference in a composition with creditors, see 16 Ann. Cas. 1072. As to the effect of a creditor's accepting a part of his debt on his rights as to the whole, see 28 Am. Rep. 293. As to composition with creditors as distinguished from accord and satisfaction, see 100 Am. St. 394.

INDIANA NATURAL GAS AND OIL COMPANY v. HARPER ET AL.

[No. 7,653. Filed June 4, 1912.]

1. COVENANTS.—*Covenants Running With the Land.—Gas Lease.*—A covenant in a gas lease whereby the lessee is to furnish lessor with gas to light and heat the dwellings on the premises within sixty days from date of the lease, or in lieu thereof the sum of twenty dollars yearly in advance, is a covenant running with the land for a breach of which the grantee of the lessor has a right of action. p. 557.
2. MINES AND MINERALS.—*Gas Leases.—Construction.*—Where a gas lease provides unconditionally that within sixty days from date, the lessor shall have gas from the wells free of expense, for heating and lighting his premises, or in lieu thereof the sum of \$20 yearly, and also provides for the indefinite postponement of the digging of a well on payment of a rental of \$28 per year, the liability of the lessee for the payment of rent in lieu of furnishing gas is not dependent on the drilling of a well. p. 558.
3. MINES AND MINERALS.—*Gas Lease.—Covenants.—Retention of Lease.—Effect.*—Where a gas lease provides that the lessee may

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at any time reconvey the grant and thereby terminate the lease, the mere retention of the instrument itself is a sufficient claim of privileges thereunder to keep in operation the covenants therein contained. p. 558.

From Blackford Circuit Court; *Charles E. Sturgis*, Judge.

Action by Hannah E. Harper and another against the Indiana Natural Gas and Oil Company and another. From a judgment for plaintiffs, the defendant Indiana Natural Gas and Oil Company appeals. *Affirmed.*

W. O. Johnson, Blackledge, Wolf & Barnes, for appellant.
A. R. Long and *L. F. Sprague*, for appellees.

IBACH, J.—The amended complaint avers that plaintiff Hannah E. Harper, the owner of certain lands in Grant county, Indiana, on May 18, 1897, entered into a lease contract, set out in the complaint, with one J. P. Forrest, granting to him the oil and gas rights in these lands. This lease contract was sold by Forrest to the Indiana Natural Gas and Oil Company, for a valuable consideration. Hannah E. Harper sold and conveyed by warranty deed, for a valuable consideration, to plaintiff Mack E. Lewis twenty acres of the lands described in said contract, and he is now the owner in fee simple of such tract so conveyed, and ever since the execution of said contract he and Hannah E. Harper have been and now are the owners in fee simple of the lands described in said lease contract. The fourth provision of the lease contract is as follows: "First party shall have, free of expense, gas from the well or wells to use, at his own risk, to light and heat the dwellings now on the premises, with pipe to conduct the same to said dwellings free of cost, within sixty days from this date, or in lieu thereof the sum of twenty dollars yearly in advance." Ever since assignment by defendant Forrest to defendant company, said assignee has had control of and held said lease, and for some years paid the rental and fuel money thereon. Said defendant company still continues to hold said lease,

but has failed, neglected and refused to furnish gas for fuel in the buildings now on said land, and which were on the land at the time of the execution of said lease, and has failed, neglected and refused to pay the \$20 in lieu of said gas, which became due on the first days of May in the years from 1901 to 1908, inclusive. Defendant, Indiana Natural Gas and Oil Company, has drilled one well on said land, on which it has long since ceased payment; no other wells have been drilled by defendant, or by any other person. Judgment for \$198.40 is prayed.

Appellees recovered judgment for \$54 and costs. It is assigned as error that the amended complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling appellant's demurrer to the plaintiffs' second amended complaint.

It is first urged that the complaint does not state any facts whatever which show a right of action in the plaintiff Lewis, under the clause of the lease sued on.

This identical form of lease has been considered in the case of *Indiana Nat. Gas, etc., Co. v. Hinton* (1902), 159

Ind. 398, 64 N. E. 224, and *Indiana, etc., Oil Co. v.*

1. *Ganiard* (1910), 45 Ind. App. 613, 91 N. E. 362, and

it was there held that the agreement of the lessee to furnish the lessor with gas to heat and light the dwellings on the premises demised was a covenant running with the land, and the assignee of the lessee was bound to perform it. In the case of *Indiana Nat. Gas, etc., Co. v. Leer* (1904), 34 Ind. App. 61, 72 N. E. 283, and *Indiana Nat. Gas, etc., Co. v. Lee* (1904), 34 Ind. App. 119, 72 N. E. 492, it was held that the assignee of the grantor was bound by the covenants. Since these were covenants running with the land, and since it is averred that plaintiff Lewis was an owner in fee simple of part of the land, the complaint sufficiently states a cause of action in him.

It is next urged, that since the complaint shows that appellant drilled a well on the land and long since ceased

payment, and has drilled no other wells, there are no facts showing that appellant has ever claimed any rights or privileges whatever under this lease since the failure of gas in the well drilled, and that where a well is drilled and fails, the right to have fuel gas from the wells on the premises fails with it.

The fourth provision of the lease is unconditional—that the lessor shall have gas from the wells within sixty days from date, or in lieu the sum of \$20 yearly. It was

2. not necessary to drill a well in order to create this liability, for by another clause of the contract, defendant might have postponed indefinitely the digging of a well by paying a yearly rental of \$28 per year, and it has been held by the courts that the liability for rent in lieu of fuel is not dependent on the drilling of a well. *Indiana Nat. Gas, etc., Co. v. Hinton, supra.*

The seventh provision of the lease is as follows: “The second party may at any time reconvey this grant, and thereupon this instrument shall be null and void.”

3. Merely by retaining the lease instrument itself, appellant has claimed sufficient privileges to keep in operation the covenants therein contained. If it wanted to avoid liability on its covenants, it had an easy remedy by reconveyance. Having elected rather to retain the lease, it must make good its agreements. It appears in the complaint that appellant has had control of and holds the lease, and it appears that it has not reconveyed the grant.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 743. See, also, under (1) 11 Cyc. 1080; (2) 27 Cyc. 722, 741. As to covenants creating charges and whether they run with the land, see 82 Am. St. 684.

MILLIGAN ET AL. v. ARNOLD, SURVEYOR, ET AL.

[No. 7,532. Filed June 4, 1912.]

1. **DRAINS.—Statutes.—Repeal.—Repeal by Implication.**—The act of March 11, 1907 (§6140 Burns 1908, Acts 1907 p. 508), which relates to the repair and cleaning of ditches, expressly repeals all laws theretofore enacted in relation to drainage, except as to certain pending proceedings, and the act of March 12, 1907 (§6160 Burns 1908, Acts 1907 p. 600), which is declared to be supplemental to said act of March 11, together fully cover said subject and provide additional penalties not found in the old law, so that, although that portion of §10 of an act approved March 6, 1905 (Acts 1905 p. 456, §5631 Burns Supp. 1905), providing “that such parts of public drains as are within the corporate limits of any city or town shall be kept in repair by such city or town,” is not found in either of said acts of 1907, by giving to the repealing clause of the act of March 11, 1907, the broad scope it seems to have and considering the legislative intent as gathered from the title of the act of March 12, 1907, said acts operated to repeal §10 of said act of March 6, 1905. pp. 560, 563.
2. **CONSTITUTIONAL LAW.—Statutes.—Subject.—Title.**—Under the provisions of the Constitution (Const., Art. 4, §19) the subject-matter of a legislative enactment must be expressed in its title, and a failure in this respect will invalidate the part not so expressed. p. 562.
3. **STATUTES.—Validity.—Title of Act Broader than Subject.**—A legislative enactment is not invalid on the ground that its title is broader than the subject of the legislation, since the body of the act is the legislative expression. p. 562.
4. **STATUTES.—Titles.—Legislative Intent.**—The title of an act may be considered in determining the legislative intent. p. 562.
5. **STATUTES.—Repeal by Implication.**—The law does not favor the repeal of a statute by implication. p. 562.
6. **STATUTES.—Repeal by Implication.**—When a new statute is intended to furnish the exclusive rule on a certain subject, or when it covers the whole subject-matter of an old statute and adds new provisions and makes changes, and is evidently intended to be a revision, it repeals the old law by implication. p. 562.

From Superior Court of Tippecanoe County; *Henry H. Vinton*, Judge.

Action by John W. Milligan and others against Alba G.

Milligan v. Arnold—50 Ind. App. 559.

Arnold, as surveyor of Tippecanoe County, and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

Charles M. Zion, for appellants.

George D. Parks and *Morris R. Parks*, for appellees.

MYERS, J.—Appellants, as lot owners within the corporate limits of the town of Clarkshill, and Clarkshill, an incorporated town, on September 5, 1908, commenced this suit against appellees, Alba G. Arnold, surveyor, J. Lynn Van Natta, treasurer, and John P. Foresman, auditor, respectively, of Tippecanoe county, and Perry A. Davis, trustee of Lauramie township in said county, praying that certain assessments made by said Arnold, as county surveyor, on their lots within the corporate limits of said town, and against said town, for the purpose of paying the costs and expenses of cleaning out and repairing a certain public ditch, which, together with its branches and laterals, extends into and through said town, be declared null and void, and that each of said parties, in their respective representative capacity, and their successors in office be forever enjoined from proceeding in any manner with the collection of such assessments.

A demurrer to the complaint, for want of facts, was sustained, and this ruling is assigned as error.

At the 1907 session of the legislature, two acts were passed relating to the repair and cleaning of ditches constructed under the law passed at that session, or under any
1. former law. These acts were approved March 11 and March 12, 1907 (Acts 1907 p. 508, §6140 Burns 1908; Acts 1907 p. 600, §6160 Burns 1908). The complaint in this case does not show by what authority the surveyor and trustee assumed to act in making the allotments and assessments, but alleges that such allotments and assessments were made without authority of law. As grounds for this insistence they argue that §10 of an act approved

March 6, 1905 (Acts 1905 p. 456, §5631 Burns Supp. 1905), is still in force, and under its provisions county surveyors have no jurisdiction over lands and lots within the corporate limits of cities and towns.

Section 10, among other things, provides: "That such parts of public drains as are within the corporate limits of any city or town shall be kept in repair by such city or town." In the case of *Quick v. Templin* (1908), 42 Ind. App. 151, 85 N. E. 121, it was held that the county surveyor under this section had no authority over ditches in cities and towns, and he was not authorized to assess lands and lots therein to pay for repairs made on that portion of the drain without such corporate limits.

The act of March 12, *supra*, is declared to be supplemental to the act of March 11, *supra*, and together they fully cover the subject of cleaning and repairing public drains, with additional penalties not found in the old law on that subject. The act of March 11 expressly repeals all laws and parts of laws theretofore enacted in relation to drainage, except certain pending proceedings. The matter here in question is not one within the exception. That part of §10 herein quoted is not found in either act of 1907, consequently if we should give the repealing clause to which we have referred the broad scope it seems to have, it would include §10.

Appellants, however, insist that the surveyor and trustee, in making the allotments and assessments about which they complain, proceeded under the act of March 12, *supra*, which is devoted exclusively to the repair of all drains established by law. Under the act of 1905, *supra*, it was the duty of the surveyor to repair and clean public ditches, while under either law of 1907, except as provided in §20 (Acts 1907 p. 508, §6159 Burns 1908), that duty is placed on the township trustee. Considering appellants' insistence, it will be noticed that §10 is not mentioned in the body of that act, but

the title thereto reads as follows: "An Act providing methods for the repair of public ditches and drains and repealing section ten of an act entitled 'An act concerning drainage', approved March 6, 1905."

In this State, a constitutional provision (Const. Art. 4, §19) requires the subject-matter of a legislative enactment to be expressed in the title, and a failure in this re-

2. spect will invalidate the part not so expressed. *Mewherter v. Price* (1858), 11 Ind. 199; *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 90 N. E. 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85. But we know of no rule of law, or case, holding a legislative enactment invalid on the ground

3. that its title is broader than the subject of the legislation. The body of the act is the expression of the legislature. The title may be considered in determining the legislative intent. *State, ex rel., v. Board, etc.*

4. (1906), 166 Ind. 162, 195, 76 N. E. 986; *State v. Brugh* (1892), 5 Ind. App. 592, 32 N. E. 869. It is clear that §10, *supra*, is not expressly repealed by the act of March 12, hence its repeal, if at all, under

5. this act, must be by implication, a method the law does not favor. *Blain v. Bailey* (1865), 25 Ind. 165; *Pomeroy v. Beach* (1898), 149 Ind. 511, 49 N. E. 370; *State, ex rel., v. Commercial Ins. Co.* (1902), 158 Ind. 680, 684, 54 N. E. 466; *State v. Shelton* (1906), 38 Ind. App. 80, 77 N. E. 1052. Having determined that the act now under consideration fully includes §10, *supra* (other than the provision apparently intended to be omitted), and adds new provisions and provides certain additional penalties,

6. the present question for decision is controlled by the well-settled law "that when a new statute was intended to furnish the exclusive rule on a certain subject, it repeals by implication the old law on the same subject, or when a new statute covers the whole subject-matter of an old

one, and adds new provisions and makes changes, and where such new law, whether it be in the form of an amendment or otherwise, is evidently intended to be a revision of the old, it repeals the old law by implication.” *Findling v. Foster* (1908), 170 Ind. 325, 84 N. E. 529.

In the case of *City of Martinsville v. Washington Tp.* (1910), 46 Ind. App. 200, 92 N. E. 191, the question presented and considered involved the collection of a

1. certain sum of money expended by the township trustee in cleaning out that portion of a public ditch which had been allotted to the city of Martinsville. The action was defended on the ground that there was no authority under the law for the trustee to make the assessment. After referring to several sections of the acts bearing on the questions involved in the present case, it is said: “The various sections of the statute in question contemplate the construction, repair and keeping clean of such ditches, for the common welfare of the people—the residents of towns and citizens of townships. The legislature has named a common officer to protect and care for such drains, and has provided a method by which it shall be done.” The right of the trustee to enforce payment of the money thus expended by him was sustained. Among the reasons given in support of this ruling was that the legislature had recognized “that there may be interests, general and mutual, between citizens and property within the city and outside the city and within the civil township,” and by affirmative legislation these mutual interests were protected and enforced by a common officer. In the same case it is further said: “Section 267 of the ‘cities and towns act’ (Acts 1905 p. 219, §8961 Burns 1908) provides that cities and towns shall have exclusive power over their streets, highways and alleys, except when otherwise provided by law. The matter of public drains furnishes an exception.”

In view of the law as announced in the cases cited, we

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must conclude that §10 was repealed by said acts of 1907. No other question is presented by this appeal. The judgment is therefore affirmed.

NOTE.—Reported in 98 N. E. 822. See, also, under (1) 36 Cyc. 1077; (2) 36 Cyc. 1017; (3) 36 Cyc. 1032; (4) 36 Cyc. 1133; (5) 36 Cyc. 1071; (6) 36 Cyc. 1077, 1079. For a discussion of the validity of a statute having a title more comprehensive than the act itself, see Ann. Cas. 1912 A 102. As to the nature, object and effect of the constitutional provision with reference to the sufficiency of the title of a statute, see 64 Am. St. 70.

STEELE v. SPAUNHURST ET AL.

[No. 7,673. Filed June 4, 1912.]

1. TRIAL.—*Instructions.—Objection Cured by Other Instructions.*—Where, in an action to recover damages for malpractice, the court in one of its instructions called the attention of the jury to the inquiry, whether, under the evidence, defendants were negligent in failing to anticipate and provide against the occurrence which caused the injury, the impropriety, if any, in the giving of such instruction was cured by the further instruction that the court did not intend to indicate any opinion as to the facts in the case or that he had any opinion as to what facts were proved or disproved by the evidence. p. 565.
2. TRIAL.—*Instructions.—Consideration.*—The instructions given in a case are to be considered as a whole. p. 565.
3. APPEAL.—*Joint Objection to Instructions.—Effect.*—To make a joint objection to instructions available, it must appear that all the instructions named are incorrect. p. 565.
4. APPEAL.—*Joint Objection to Instructions.—Waiver.*—Where the giving of a number of instructions was jointly assigned as cause for a new trial, the failure to point out an objection to one of such instructions on appeal is a waiver of any objection to the instructions included in the assignment. p. 566.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Action by Emma C. Steele against John F. Spaunhurst and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

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Hiram L. Thomas, Jonas P. Walker and Arthur C. Van Duyn, for appellant.

John B. Elam, James W. Fesler and Harvey J. Elam, for appellees.

FELT, J.—Appellant brought this action against appellees, to recover damages for alleged malpractice. The cause was tried by a jury which returned a verdict in favor of appellees. Appellant's motion for a new trial was overruled, and the alleged error in such ruling is the only question presented by this appeal.

Appellant insists that the trial court erred in giving each of instructions three, four and five tendered by appellees.

The only specific objection urged to the instructions

1. is that the court invaded the province of the jury in instruction four, and gave the jury to understand that appellant's alleged injuries were due to an accident.

The instruction simply called the attention of the jury to the inquiry, whether, under the evidence, "the defendants were negligent in failing to anticipate and provide against the occurrence," and did not purport to be the basis of any finding or conclusion. This instruction was perhaps unnecessary to a proper presentation of the case to the jury, but it was not harmful to appellant, for in instruction thirteen the jury were expressly told that "The court does not intend to indicate to you any opinion as to the facts in this case or that he has any opinion as to what facts are proven or disproven by the evidence."

Instructions are to be considered as a whole and not in detached parts, and when so considered those given

2. in this case are as favorable to appellant as the law will warrant. Furthermore, the objection to the several instructions is joint, viz., "the court erred in giving instructions numbered one, two, three, four and five, 3. asked and requested by the defendants." To make this a good assignment of error, it must appear that

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all the instructions named are incorrect. Appellant raises no objection to either instruction one or two, and thus

4. waives any objection to the instructions included in said cause for a new trial. *Cincinnati, etc., R. Co. v. Cregor* (1898), 150 Ind. 625, 50 N. E. 760; *Cargar v. Fee* (1895), 140 Ind. 572, 39 N. E. 93; *Chicago Furniture Co. v. Cronk* (1905), 35 Ind. App. 591, 74 N. E. 627.

No error appearing in the record, the judgment is affirmed.

NOTE.—Reported in 98 N. E. 733. See, also, under (1) 38 Cyc. 1782; (2) 38 Cyc. 1778; (3) 38 Cyc. 1800; (4) 2 Cyc. 992. As to the invasion by the court of the province of the jury, see 14 Am. St. 36.

INDIANA UNION TRACTION COMPANY v. PRING.

[No. 7,149. Filed October 26, 1911. Rehearing denied March 13, 1912. Transfer denied June 4, 1912.]

1. LIMITATION OF ACTIONS.—*Complaint.—Amendment Operating to Defeat Statute.*—An amendment to a complaint will not be permitted when it will operate to defeat the statute of limitations. p. 575.
2. LIMITATION OF ACTIONS.—*Action for Negligence.—Complaint.—Amendment.—Amendment Not Amounting to Independent Charge of Negligence.—Effect.*—In an action for injuries to an inter-urban railway motorman, where the complaint charged that on the day of the injury it was cold, sleeting, raining, lightning, freezing, foggy, dark and cloudy and that ice was frozen on defendant's telephone wires so that they were useless in directing the movement of defendant's cars, that defendant's trainmaster, knowing such fact and knowing that plaintiff was then engaged on a south bound car somewhere between two sidings, manned a car with a crew and himself acting as motorman thereon caused the same to proceed northbound as a wild car without a schedule, that carelessly and negligently failing to inform the train dispatcher of his act he proceeded with said car to a point where defendant's double track merged into a single track, where, for the first time, he attempted to notify the dispatcher by telephone that he had ordered out said wild car, and being unable to communicate with the dispatcher because of the useless condition of the wires, he negligently ordered and directed the car to continue on its journey northward along the single

track, thereby causing a collision in which plaintiff was injured, that part of the complaint descriptive of the condition of the wires having been inserted by way of amendment after the expiration of the time limited for the commencement of a new action, was not for that reason subject to a motion to strike out, since such matter did not amount to an independent charge of negligence as a proximate cause of the injury, but simply gave character and degree to the charge of negligence in ordering or taking out the wild car under the existing circumstances. p. 575.

3. **PLEADING.—Complaint.—Amendment.—Right to Amend.**—Where a recovery on the original complaint would operate as a bar to a recovery on the complaint as amended, or if the amendment will not deprive defendant of any defense he had to the original suit, the plaintiff is entitled to amend. p. 577.
4. **APPEAL.—Review.—Law of the Case.**—Although a former decision of a case on appeal is the law of the case where the question presented on a subsequent appeal remains the same, it is not necessarily so as to new or additional questions presented on such subsequent appeal. p. 578.
5. **MASTER AND SERVANT.—Injury to Servant.—Interurban Railroad.—Negligence of Vice-Principal.—Complaint.—Sufficiency.**—In an action by an interurban railway motorman for injuries in a collision with a car negligently sent out without a schedule by defendant's trainmaster, where the complaint alleged that such trainmaster had jurisdiction over the operative department throughout defendant's entire system, with authority to employ and discharge men and to decide when and under what conditions a special car should be sent out, that said trainmaster, knowing the plaintiff was engaged on a southbound car somewhere between two certain sidings, and knowing the impossibility of directing the movements of defendant's cars owing to the severe weather conditions which had rendered defendant's telephone system useless for that purpose, and while carelessly and negligently failing to inform defendant's train dispatcher of his intention, manned a car with a crew and ordered said car to proceed northbound, with himself acting as motorman thereon, that on arriving at a point where defendant's double track merged into a single track, he attempted to communicate with the train dispatcher by telephone, and, being unable to do so, negligently ordered and directed said car to proceed on the journey northward, thereby causing the collision in which plaintiff was injured, the complaint sufficiently showed the violation of a duty owing by the trainmaster as vice-principal, and that the negligence charged was not that of a co-servant with the plaintiff. p. 578.

6. **MASTER AND SERVANT.—Injury to Servant.—Interurban Railroads.—Negligence of Vice-Principal.—Evidence.**—In an action by an interurban railroad motorman for injuries received in a collision, where it was alleged that defendant's trainmaster, without notice to the train dispatcher, ordered out a special car and directed it to proceed northbound, thereby causing the collision in which plaintiff was injured, evidence that the movement of defendant's cars was directed by means of a telephone system and that on the day of the injury such train master knew that the telephone system was not in working order because of the severe weather conditions, was admissible as bearing on the character of the trainmaster's conduct and for the purpose of determining whether he was negligent in doing what he did. p. 579.
7. **TRIAL.—Reception of Evidence.—Purpose.**—Where evidence is competent for any purpose no error can be predicated on its admission. p. 579.
8. **MASTER AND SERVANT.—Injury to Servant.—Interurban Railroads.—Incompetency of Vice-Principal.—Evidence.—Specific Acts.**—Where a paragraph of complaint in an action against an interurban railroad company for personal injuries proceeded on the theory of the incompetency of defendant's trainmaster, evidence of specific acts of his prior incompetency was admissible to show knowledge of his incompetency on the part of the defendant. p. 579.
9. **TRIAL.—Reception of Evidence.—Evidence Competent for Certain Purpose.—Limiting Effect.—Instruction.—Failure to Request.**—Where evidence is admissible for a certain purpose, and there is a probability that the jury may consider it on the main proposition in the case, the party likely to be prejudiced thereby may tender an instruction in which the application of such evidence is properly restricted and limited, and failing so to do, such party cannot be heard to complain of its prejudicial effect. p. 580.
10. **MASTER AND SERVANT.—Injury to Servant.—Interurban Railroad.—Vice-Principal.—Fellow Servant.—Evidence.**—In an action by a motorman against an interurban railroad company for personal injuries, where it was shown that by the rules of defendant extra trains did not appear on the time tables and had no rights except those given them by the train dispatcher, and were not to be run without his orders, and that all interurban trains were required to report to him at certain sidings, and it was further shown that defendant's general trainmaster, while in full charge of the transportation department, ordered out and manned an extra car with himself acting as motorman thereon, and without notifying the train dispatcher of his intention, ordered and directed the car to proceed northbound to a siding, whence he

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attempted to notify the train dispatcher by telephone and, being unable to so notify the dispatcher, ordered that said car continue northbound thereby causing a collision in which plaintiff was injured, the evidence was sufficient to sustain a verdict for plaintiff, since the mere fact that such trainmaster acted as motorman did not lose him his identity as a representative of his master so as to render the negligence that of a fellow servant. pp. 580, 582.

11. **MASTER AND SERVANT.—Negligence.—Vice-Principal Performing Duties of Servant.**—Where a vice-principal undertakes to perform for the master the duties and service of the servant, he at the time having authority so to do, his negligence in performing such service is the negligence of a co-servant, but if he acts in his capacity of vice-principal, and not in that of a co-laborer, the master is liable for his negligent act. p. 581.

12. **MASTER AND SERVANT.—Duty of Master.**—The master must not expose his servants, while conducting his business, to perils or hazards which may be provided against by the exercise of due care and proper diligence on the part of the master. p. 583.

13. **MASTER AND SERVANT.—Acts of Servant Within Scope of Authority.—Liability.**—When an employe acts as and for the master, and acts within the scope of his authority, he binds his master the same as if the master had himself acted, and when a master delegates to a servant the performance of a duty which rests on the master alone, he is liable for the manner in which it is performed. p. 583.

14. **MASTER AND SERVANT.—Vice-Principal.—Fellow Servants.—Dual Capacity.—Negligence.—Liability.**—An employe of a master may at the same time be a fellow-servant and an agent or representative of the master, and when such dual capacity exists, his negligent performance of that which he is authorized to do as agent or representative of the master renders the master liable in damages for injury resulting therefrom to a servant who is himself without fault. p. 587.

15. **MASTER AND SERVANT.—Injury to Servant.—Negligence.—Negligence of Fellow Servant Contributing to Injury.—Liability.**—Where the negligent act of the master's representative is the proximate cause of an injury to a servant, the mere fact that the negligent act of a co-servant contributes to the injury will not defeat the servant's right to recover. p. 588.

16. **MASTER AND SERVANT.—Injury to Servant.—Negligence.—Proximate Cause.—Instruction.**—An instruction in which the jury was told that if it believed from the evidence that the defendant was guilty of the negligence charged and that the injuries complained of "were the natural consequences of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence should be regarded

as the proximate cause of the injury," sufficiently embodied the factor of probability of the consequence of the negligence without the use of the word "probable," and was not erroneous. p. 589.

17. **MASTER AND SERVANT.—Injury to Servant.—Interurban Railroads.—Incompetency of Vice-Principal.—Burden of Proof.—Instruction.**—In an action for injuries to an interurban railroad motorman, caused by a collision with a car being operated by defendant's general trainmaster, where the complaint proceeded on the theory of the incompetency of such trainmaster, an instruction that the burden was on defendant to show that plaintiff knew of such trainmaster's alleged incompetency was erroneous, since the burden was on plaintiff to show that he had no such knowledge. p. 590.

18. **APPEAL.—Review.—Harmless Error.—Instruction as to Burden of Proof.**—Where, in an action against an interurban railroad company for personal injuries, based on the theory of the incompetency of defendant's trainmaster, the plaintiff produced sufficient affirmative proof to justify the finding that he had no knowledge of the incompetency charged, and no proof to the contrary was offered, an instruction placing the burden on defendant to prove that plaintiff knew of such incompetency, although erroneous, was harmless. p. 590.

19. **MASTER AND SERVANT.—Injury to Servant.—Interurban Railroads.—Operation.—Duty of Master.—Vice-Principal.—Negligence.—Instructions.**—In an action by an interurban railway motorman for injuries received in a collision with a wild car ordered out by defendant's trainmaster without notice to defendant's train dispatcher, and which was operated by such trainmaster himself as motorman, an instruction was not erroneous which told the jury that the ordering of the starting of its trains or cars is an absolute duty of the company and when that duty is entrusted by it to an officer or employe he in discharging the same becomes a vice-principal, for whose negligent act in that respect the company is liable to anyone, employe or otherwise, who without fault is injured thereby, and that the running and operating of its cars is not a duty of the master to the servant, that the operators on such cars are fellow servants and that the master is not liable for injury to its employes by the negligent act of a fellow servant, where the master has used care and diligence in selecting competent servants. p. 591.

From Randolph Circuit Court; *James S. Engle*, Judge.

Action by James A. Pring against the Indiana Union Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

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J. A. Van Osdol, Kittinger & Diven, for appellant.

Edward R. Templer, Van L. Ogle, George H. Koons and *George H. Koons, Jr.*, for appellee.

HOTTEL, J.—Action by appellee for damages on account of personal injury received in a collision while in the employ of appellant as checkman, engaged in handling and checking freight and express matter on one of appellant's electric cars.

The case is before this court on a second appeal, a former judgment in favor of appellee obtained in the Delaware Circuit Court having been reversed because of the insufficiency of the original complaint. *Indiana Union Traction Co. v. Pring* (1908), 41 Ind. App. 247, 83 N. E. 733.

After reversal, an amended complaint in three paragraphs was filed in the Delaware Circuit Court. A motion to strike out parts of this complaint was first filed, which was overruled and exception given to appellant, after which demurrers were filed to each paragraph, which were also overruled and exception given to each ruling.

The case was then put at issue by answer in general denial, and a special answer of the statute of limitations, and reply in general denial.

There was a trial by jury, verdict for appellee in the sum of \$5,750, judgment on the verdict, motion for new trial overruled and exception by appellant, and appeal to this court.

The errors assigned and relied on are the rulings of the court on the motion to strike out parts of the amended complaint, the demurrers to each paragraph of the complaint, and the motion for a new trial.

The third paragraph of the amended complaint, covering forty pages of appellee's brief, presents all the questions raised by this appeal so far as the pleadings are concerned. The length of this paragraph forbids a copy in this opinion, and we will attempt to set out only enough of the same

to render intelligible our disposition of said questions, and our reasons therefor.

This paragraph alleges the corporate existence of the appellant; the nature and character of its business as a carrier; the employment of appellee; the nature and character of his duties, and the service required of him under his employment; the occurrence of the collision of the two cars; appellee's resulting injuries, and their nature and extent; and alleges, in addition, the following further facts, which we quote from appellant's summary: "That at the time in question all of defendant's express cars were run on orders issued by the defendant through its train dispatcher, by means of telephone; that said Joseph Mahoney was in its employ as general trainmaster, with jurisdiction over its entire system, and that he had authority to take cars to any point on its line; was authorized to employ and discharge men, and do all things necessary to properly superintend defendant's business in the operative department, and was authorized to decide when, how, and under what conditions a special car should be sent out. That Charles Baldwin was its general superintendent of transportation; that the said Mahoney was next in authority and empowered to act in his stead in his absence. Avers that the office of said Mahoney was in the Union Block in the city of Anderson, and avers the proximity of the office rooms of the dispatcher to Baldwin and Mahoney. That defendant's railway track, from the City of Anderson to siding 30, which was located on the northern outskirts of said city, was a double track, at which was located two telephones, used by its motormen and conductors in communicating with its train dispatcher. That on the day in question, it was cold, sleeting, raining, lightning, freezing, foggy, dark and cloudy; ice was frozen upon its telephone wires, and the electric current then prevailing made said telephones useless for directing the movement of its cars; that said telephones and lines were then not in good working order; that defendant and its train dispatcher

and the said Mahoney well knew that fact; and that the said Mahoney, in the absence of the said Baldwin, undertook to and did, man a car with a crew, and sent the same out as a wild car without a schedule, knowing the condition of said telephones and lines that messages could not be sent over the same or received, and knowing that the car on which plaintiff was then engaged was between sidings 33 and 32, coming southward; and the said Mahoney, knowing that the train dispatcher did not know of his intention to send out, take out, or cause to be taken out, said wild car from Anderson to Tipton, the defendant, acting through the said Mahoney, as such trainmaster, carelessly and negligently failed to telephone from the office of the said Mahoney to the dispatcher, while at his office in the Union Block, that he was going to send out said car, and then and there negligently failed to go to the office of the train dispatcher in said Union Block, and so notify him, and that the said Mahoney then and there negligently failed to give said dispatcher notice of the taking out of said wild car, and that the train dispatcher had no knowledge thereof, and 'did then and there decide for the defendant to man said car with one McDonald as its conductor, and himself as motorman; * * * and did then and there order said car from the defendant's barns * * * and did then and there order the said McDonald as conductor, and himself as motorman, to proceed with said car and take the same out * * * northbound, and in obedience to said orders, the said McDonald, as conductor on said car, and himself, the said Mahoney, motoring said car, and performing the work of motorman in the actual running of said car, proceeded with said car northward to switch 30 * * * and attempted for the first time to notify the dispatcher, and said telephones and lines were out of repair and in bad condition, as aforesaid, and useless * * * said message could not be sent.' That from said switch 30 northward, defendant's line is a single track; that defendant had no rules by

which its employes out on its line could protect themselves from collision with a wild car going in an opposite direction, and no means had been provided for such protection. The complaint sets out a copy of the order upon which the express car proceeded from siding 33 to 32. That the said Mahoney, at said siding 30, knowing that the dispatcher could not be communicated with by telephone, 'then and there decided to order said car to be continued on its journey north-bound upon said single track line * * * and negligently ordered said crew, consisting of conductor McDonald, and himself acting as motorman in the doing of the physical, manual work of motoring said car, to proceed northward from said switch 30.' ''

It is further alleged "that the negligence of the defendant as aforesaid and the negligence of the said Joseph Mahoney as general trainmaster of the defendant acting for the defendant as such, as the agent and representative of the defendant as aforesaid, and the negligence of said Mahoney while yet in his office in failing to notify said train dispatcher of his intention to send out, take out or order out said wild car as aforesaid, under all the conditions aforesaid, was the sole and approximate cause of said collision and of plaintiff's said injuries received therein as aforesaid; * * * that said accident was caused and plaintiff's injuries received as aforesaid proximately and directly by the negligence of the defendant as aforesaid and by the negligence of the said Joseph Mahoney as general trainmaster of the defendant as aforesaid and representative and agent of the defendant as aforesaid and without any fault or negligence upon the part of the plaintiff."

The first error assigned presents the ruling of the court on the motion to strike out that part of the amended complaint which alleged the defective condition of the telephones and telephone lines. Appellant contends that these averments were absent from the original complaint, and now appear for the first time in the amended complaint, which

was filed more than two years after the happening of the injury, and that under the law an amendment will not be permitted when it will operate to defeat the statute of limitations.

Inasmuch as the same question is raised by appellant in its discussion of the evidence under the issue tendered by its answer of the statute of limitations, to avoid repetition we will at this point discuss the entire question presented by these allegations in this amended paragraph. While

1. there may be some apparent conflict in the application of the law to particular cases, we think the general proposition contended for by appellant, that an amendment will not be permitted when it will operate to defeat the statute of limitations, is well settled by the decisions of this State. *School Town of Monticello v. Grant* (1885), 104 Ind. 168, 1 N. E. 302; *Fleenor v. Taggart* (1888), 116 Ind. 189, 18 N. E. 606; *Chicago, etc., R. Co. v. Bills* (1889), 118 Ind. 221, 20 N. E. 775; *Blake v. Minkner* (1894), 136 Ind. 418, 36 N. E. 246; *Fleming v. City of Anderson* (1907), 39 Ind. App. 343, 344, 76 N. E. 266.

But do the allegations of this amended pleading, relative to appellant's telephones and telephone lines, amount

2. to an independent charge of negligence in this regard as a proximate cause of appellee's injury?

A careful reading of these allegations discloses that their purpose and intent in the pleading is not to charge independent negligence of defective telephone equipment as the cause, or even as one of the causes of appellee's injury. It seems clear to us that the sole and only negligence charged in this third paragraph of the complaint, as being the cause of appellee's injury, is that of Mahoney.

In this connection it must be remembered that this pleading alleges that at the time complained of appellant ran all its express- and freight-cars as extras, or specials, without a schedule, *upon orders issued* by appellant through its train dispatcher, *by means of telephone*.

As tending to show the negligence of Mahoney's conduct in such matter, and the character and degree of that negligence, the pleader sets out in detail the then-existing weather conditions, and the conditions of the telephones and lines as a result thereof, viz.: "That it was cold, sleeting, raining, lightning, freezing, foggy, dark and cloudy"; and "that ice was frozen upon its telephone wires, and the electric current then prevailing made said telephones useless for directing the movement of its cars, that said telephones and lines were then not in good working order; that defendant and its train dispatcher and said Mahoney well knew that fact."

It will be observed from the synopsis of the complaint that there is no charge that appellant negligently or carelessly suffered or permitted its telephone line to get in such defective and useless condition, but the allegations are all to the effect that the telephone conditions alleged were temporary, the result of extreme, extraordinary and unusual weather conditions, over which defendant had no control, and that notwithstanding the extreme weather conditions, and the telephone conditions resulting therefrom, "the said Mahoney in the absence of said Baldwin undertook to and did man a car with a crew and sent the same out as a wild car without a schedule, *knowing the conditions of said telephones and lines that messages could not be sent over the same or received.*"

These allegations simply show, or tend to show, that under the alleged prevailing weather conditions and the resulting telephonic conditions it was negligence on Mahoney's part to send this car out in the first instance, without first knowing that the train dispatcher could notify the car coming from the other direction, and also that Mahoney, before leaving his office or the station at Anderson, on account of said weather and telephone conditions, should have anticipated his inability to reach the train dispatcher by telephone from siding No. 30, thereby emphasizing the importance of his advising the train dispatcher of his intention to send out

such car before leaving the office, and of his conclusion to do so before leaving the station, and in this way and to this extent these allegations give character and degree to the negligent acts charged against Mahoney, but in no sense constitute an independent charge of negligence as the proximate cause, or as one of the proximate causes of plaintiff's injuries.

As we view the purpose, force and effect of these allegations of the pleading in this case, the authorities cited by appellant give no support to its contention, and the amendment should be treated as of the date of the filing of the original complaint, in so far as it is affected by the statute of limitations. We think we are clearly supported in this conclusion by the following authorities.

In the case of *Blake v. Minkner, supra*, at page 426, the court quotes with approval from Baylies, Code Pleading 323, the following language: "To determine whether

3. an amendment of the complaint will set up a new cause of action, * * * it is a fair test to inquire whether a recovery on the original complaint would be a bar to any recovery under the amended pleading. If it would, the amendment may be allowed; if it would not, the amendment should not be ordered."

In the case of *Fleming v. City of Anderson, supra*, at page 349 this court quotes with approval from Buswell, Limitations (1889 ed.) §364, the following language: "The principle is that where the amendment does not change the cause of action nor deprive the defendant of any defense which he had to the original suit, the plaintiff's right shall be preserved." To the same effect are the following cases: *Ohio, etc., R. Co. v. Stein* (1894), 140 Ind. 61, 39 N. E. 246; *Thrall v. Gosnell* (1902), 28 Ind. App. 174, 177, 62 N. E. 462; *Cleveland, etc., R. Co. v. Bergschicker* (1904), 162 Ind. 108, 69 N. E. 1000; *Fort Wayne Iron, etc., Co. v. Parsell* (1912), 49 Ind. App. 565, 94 N. E. 770, 775.

It is next insisted that the court erred in overruling the demurrer to this third paragraph of complaint. It is insisted that if there is no new charge of negligence made by the allegations with reference to the defective telephones and telephone lines, then the complaint remains practically the same as the original complaint, and the former decision of this court is the law of the case, and the complaint is therefore bad.

There can be no doubt that the former decision of this case by this court is the law of the case, in so far as it

applies to the facts now pleaded or the evidence in-

4. troduced thereunder, where the question presented remains the same as that decided on the original pleading; but this is not necessarily so, of course, as to new or additional questions presented by this appeal. *City of Logansport v. Humphrey* (1886), 106 Ind. 146, 6 N. E. 337; *Keller v. Gaskill* (1898), 20 Ind. App. 502, 50 N. E. 363; *Brunson v. Henry* (1898), 152 Ind. 310, 52 N. E. 407; *Fort Wayne Iron, etc., Co. v. Parsell, supra*.

Appellant makes its mistake in assuming that no amendment has been made other than that relating to rules and telephone conditions.

The grounds on which the original complaint in this case was held bad by this court were, to use the language of the court, as follows: "Under the rules established by

5. these decisions there is no sufficient averment of the duties of the different employes of appellant where the same is necessary to be shown. To aver of an employe that it was his duty, etc., is merely the averment of a conclusion, and is not sufficient, the facts showing the duty should be averred. * * * This paragraph of the complaint is also bad for the reason that it clearly appears that the negligence that caused the injury was the negligence of an employe in the operation of the road while performing the servant's duty, and who was therefore a coservant with appellee. The allegations show that appellee was an em-

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ploye in the transportation department of appellant, the same as Mahoney; that Mahoney was running the car that caused the collision; that the collision was not caused by any defect in track, roadbed, equipment or appliances, *but by negligent operation*. This is the employe's duty, and not the master's." (Our italics.) *Indiana Union Traction Co. v. Pring* (1908), 41 Ind. App. 247, 249, 83 N. E. 733.

The allegations of this amended complaint we think completely meet the objections made by this court to the original. The allegations of these amended paragraphs, as indicated by the summary of the third, above set out, to which the objections are addressed, are no longer open to the objection that they show plaintiff's injury was the result of the negligence of a coservant, nor that they allege conclusions as to the duties of the employes, rather than the facts, etc. There was no error in overruling the demurrer to either paragraph of the complaint.

In discussing the assigned error of overruling the motion for a new trial, appellant insists that it was error to admit evidence to the effect that "there was a defect

6. in the telephones and lines, and that they were out of order on that occasion."

For the reasons already indicated in discussing the ruling on the motion to strike out the allegations of the complaint on this same subject, we think there was no error in admitting this evidence. The evidence was proper as tending to throw light on the character of Mahoney's conduct, and for the purpose of determining whether he was negligent

7. in doing what he did. If competent for any purpose, no error could be predicated on the admission of the evidence.

It is next insisted by appellant "that it was error to admit
* * * evidence of specific acts of Mahoney in proof of the charge of his incompetency." In this connection

8. it should be remarked that the second paragraph of complaint proceeds on the theory that Mahoney was

incompetent, etc. In support of its contention on this question, authority is cited by appellant to the effect that proof of incompetency can only be made by proof of general reputation. 4 Thompson, Negligence §§4053, 4910; 1 Greenleaf, Evidence (15th ed.) §461.

The authorities cited by appellant support its contention to the extent that proof of specific instances of incompetency, or want of care of an employe, are not admissible for the purpose of proving negligence of such employe at the time complained of, but we find no holding in this State that this proof may not be made to show knowledge at least of the incompetency on the part of the master, but, on the contrary, the holdings in our own State are all to the effect that such proof is competent for that purpose. *Pittsburgh, etc., R. Co. v. Ruby* (1871), 38 Ind. 294, 312, 318, 10 Am. Rep. 111; *Broadstreet v. Hall* (1907), 168 Ind. 192, 204, 205, 80 N. E. 145, 10 L. R. A. (N. S.) 933, 120 Am. St. 356; *Evansville, etc., R. Co. v. Guyton* (1888), 115 Ind. 450, 17 N. E. 101, 7 Am. St. 458; *City of Delphi v. Lowery* (1881), 74 Ind. 520, 39 Am. Rep. 98.

But counsel insist that the evidence was probably considered by the jury on the main proposition. Conceding this

to be true, the error was not in the admission of the

9. evidence, because it is error to exclude evidence if admissible for any purpose. If appellant's counsel be correct in their contention, the error resulted from a failure to restrict and limit the evidence by proper instruction. Appellant failing to tender such instruction cannot be heard to complain of a prejudicial influence resulting from its own neglect and omission. *City of Delphi v. Lowery, supra*, 524.

That the verdict of the jury is not sustained by sufficient evidence is next insisted by appellant. Appellant contends

that the evidence shows that Mahoney, whose negli-

10. gence caused said injury, and appellee were at the time performing duties which they respectively owed to the master, and not duties which the master owed to his

servants, and that therefore appellee's injury was the result of the negligence of a coemploye, and there can be no recovery. Appellant bases this contention on the fact that the proof shows that Mahoney when he determined to send out the car which collided with appellee's car, having failed to get the regular motorman to accompany the same, went on the car himself as such motorman, and operated the same as such from the time the car left the barn until the collision occurred which resulted in appellee's injuries, and the further fact that there were positive printed rules of the company to the following effect, viz.: "34. Extra trains are not shown on time table, and they have no rights except those given them by the train dispatcher. * * * 37. Extra trains must not be run without orders from the dispatcher. * * * 51. All interurban trains must report to dispatcher at sidings 30, 49 and 27."

It is true, as contended by appellant, that the grade or rank of an officer or superior servant of a corporation does not necessarily furnish the test by which to determine whether or not he be a coservant of an employe of the same master. If such officer or superior servant of such corporation undertakes to perform for the master the duties

11. and service of the servant, he at the time having authority so to do, while so performing such service his negligence in performing the same is the negligence of a co-servant. *Dill v. Marmon* (1905), 164 Ind. 507, 521, 73 N. E. 67, 69 L. R. A. 163; *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 700, 68 N. E. 262, 63 L. R. A. 460; *Southern Ind. R. Co. v. Martin* (1903), 160 Ind. 280, 286, 66 N. E. 886; *Island Coal Co. v. Swaggerty* (1903), 159 Ind. 664, 667, 62 N. E. 1103, 65 N. E. 1026; *Thacker v. Chicago, etc., R. Co.* (1902), 159 Ind. 82, 85, 64 N. E. 605, 59 L. R. A. 792; *Hodges v. Standard Wheel Co.* (1899), 152 Ind. 680, 687, 52 N. E. 391, 54 N. E. 383; *American Telephone and Telegraph Co. v. Bower* (1898), 20 Ind. App. 32, 35, 49 N. E. 182; *Louisville, etc., R. Co. v. Isom* (1894), 10 Ind. App.

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691, 694, 38 N. E. 423; *Taylor v. Evansville, etc., R. Co.* (1889), 121 Ind. 124, 125, 22 N. E. 876, 6 L. R. A. 584, 16 Am. St. 372. On this question, however, the general rule recognized by the authorities cited, as well as by the courts of other jurisdictions, seems to be that where the vice-principal acts as such, and not in his capacity as a colaborer, the master is liable for his negligent act. *Consolidated Coal Co. v. Wombacher* (1890), 134 Ill. 57, 24 N. E. 627; *Fanter v. Clark*, 15 Ill. App. 470; *Chicago Anderson, etc., Brick Co. v. Sobkowiak* (1894), 148 Ill. 573, 36 N. E. 572; *West Chicago St. R. Co. v. Dwyer* (1896), 162 Ill. 482, 44 N. E. 815; *Pittsburgh Bridge Co. v. Walker* (1897), 170 Ill. 550, 48 N. E. 915; *Illinois Steel Co. v. Schymanowski* (1896), 162 Ill. 447, 44 N. E. 876; *Offut v. World's Columbian Exposition* (1898), 175 Ill. 472, 51 N. E. 651; *Louisville, etc., R. Co. v. Heck* (1898), 151 Ind. 292, 50 N. E. 988; *Louisville, etc., R. Co. v. Graham* (1890), 124 Ind. 89, 24 N. E. 668; *Evansville, etc., R. Co. v. Holcomb* (1894), 9 Ind. App. 198, 36 N. E. 39.

The evidence in this case tends, at least, to sustain the averments of the complaint on the subject of the absence of Charles Baldwin, general superintendent of transportation, on the day that plaintiff was injured, and that in his absence Mahoney had authority, as general trainmaster over appellant's entire system, to send and take cars to any point on its line, and to do all things necessary properly to superintend defendant's business in the operative department, and was authorized to decide when, how and under what conditions a special car should be sent out. There was evidence also tending to prove the other material averments of this third paragraph of complaint with reference to Mahoney taking out the car in question, and ordering and directing its movements. The mere fact that Mahoney went on the car as motorman did not necessarily lose him his identity as such representative of his master. Under the authorities, we think it clear that

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the same person may at one and the same time be both master and servant, that in the actual manual operation of the car as motorman Mahoney was performing the service of a servant, but that in authorizing and directing the movements of such car he represented and necessarily performed the service of master. *Cole Bros. v. Wood* (1894), 11 Ind. App. 37, 59, 60, 36 N. E. 1074; *Chicago, etc., R. Co. v. Strong* (1907), 228 Ill. 281, 81 N. E. 1011.

Some of the general principles which underlie the question here involved as expressed by the courts of this State

are as follows: "It is the obligation or duty of the

12. master not to expose his servants while conducting his business to perils or hazards which might have been provided against by the exercise of due care and proper diligence on the part of the master." *Pennsylvania Co. v. McCaffrey* (1894), 139 Ind. 430, 441, 38 N. E. 67, 29 L. R. A. 104. See, also, *Baltimore, etc., R. Co. v. Rowan* (1885), 104 Ind. 88, 94, 3 N. E. 627.

When the employe acts as and for the master, and acts within the scope of his authority, he binds his master the same as if the master had himself acted. *Evansville,*

13. *etc., R. Co. v. McKee* (1885), 99 Ind. 519, 522, 50 Am.

Rep. 102; *Terre Haute, etc., R. Co. v. McMurray* (1885), 98 Ind. 358, 368, 49 Am. Rep. 752; *Consolidated Coal Co. v. Wombacher, supra*; *Offut v. World's Columbian Exposition, supra*.

Whenever a master delegates to a servant the performance of a duty which rests on the master alone, he is liable for the manner in which the duty is performed. *Lindvall v. Woods* (1889), 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; *Harrison v. Detroit, etc., R. Co.* (1890), 79 Mich. 409, 44 N. W. 1034, 7 L. R. A. 623, 19 Am. St. 180.

"Where a master employs one in a vocation requiring him to act under certain conditions and commits to his discretion the duty of determining when and what action may be necessary, the employer will be responsible for the misjudg-

ment, as well as the misconduct of the servant, and if he acts when there is no occasion for it at all, though intending to accomplish some end of the employment, such responsibility will still exist." *Oakland City, etc., Society v. Bingham* (1892), 4 Ind. App. 545, 549, 41 N. E. 383. See, also, *Pittsburgh, etc., R. Co. v. Sullivan* (1895), 141 Ind. 83, 88, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. 313; *Pennsylvania Co. v. Weddle* (1885), 100 Ind. 138, 141; *Fogarty v. St. Louis Transfer Co.* (1904), 180 Mo. 490, 79 S. W. 664.

As throwing further light on the particular question involved in the application of these general principles to the facts of this case as presented by the evidence, we submit some expressions of the courts of other jurisdictions which influence this opinion. The supreme court of Illinois in the case of *Chicago, etc., R. Co. v. McLallen* (1876), 84 Ill. 109, at page 116, said: "As between the conductor and the company, the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation. His orders to the conductor of a train are, essentially, the orders of the employer. This rule applies as well to all orders issued by his assistants in his office, and issued in his name. * * * If those intrusted by him with the management of the business of the corporation, by orders issued in his name, neglect to issue a necessary order, that is his neglect, and the negligence of the corporation."

In the case of *Dayharsh v. Hannibal, etc., R. Co.* (1890), 103 Mo. 570, 576, 15 S. W. 554, 23 Am. St. 900, the supreme court of that state said: "He [the night hostler or boss] was obviously intrusted at the time with the master's power of control of the practical business done at the roundhouse, of directing the movement of the engines, and of the plaintiff and of the other employes there. * * * It was undoubtedly within the scope of Mr. Stephens' authority, as 'night hostler' or 'boss' to direct where the engine and tender, that struck plaintiff, should be placed, and how and when they should be moved over the tracks. In giving

directions to that end and seeing to their execution, we think he was performing the master's part, and as such was the representative of the latter and not a mere fellow servant of the plaintiff. If he had expressly directed the engine to be moved down by another upon the plaintiff, in the manner described in the evidence for the latter, the defendant would have been responsible for the act, and we are unable to perceive any logical or reasonable distinction between so directing it and his performing such negligent act himself, in the circumstances here shown. It was one which fell within his authority as the master's representative to direct, and it can make no difference in principle whether he did it personally or by another, in its bearing on the rights of the parties to this cause, where his act involved an obvious breach of the master's duty to use care to provide a reasonably safe place for plaintiff to work (as already defined). The performance of that duty was intrusted to the 'hostler' and his negligence in not performing it is ascribable to the master."

That court again said, in the case of *Miller v. Missouri Pac. R. Co.* (1891), 109 Mo. 350, 356, 19 S. W. 58, 32 Am. St. 673: "There is no doubt but a foreman or other representative of the master may occupy a dual position; that is to say, he may at the same time be a fellow-servant and an agent or representative of the master. There are certain duties which are personal to the master, and for the non-performance of which he is liable to his servants. These duties may be delegated to a foreman or even to a servant, and the master is still liable for their non-performance."

In *Slater v. Jewett* (1881), 85 N. Y. 61, 39 Am. Rep. 627, the late Chief Justice Folger thus clearly stated the duties of railways in this particular: "It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; that when there is a variation from the general time-table for a special occasion and purpose, it is as much

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the duty and act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and that, therefore, whomever he uses to bring those time-tables to the notice of his servants, he puts that person in his place to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done and done effectually; and that if, instead of doing it in person, he chooses to do it through an agent, that agent, *pro hac vice*, is he, the master, and he, the master, is responsible for a negligent act therein of that agent whereby a fellow-servant of him is harmed.”

See, also, *Lewis v. Seifert* (1887), 116 Pa. St. 628, 648, 11 Atl. 514, 2 Am. St. 631.

The Supreme Court of our own State, in the case of *Cincinnati, etc., R. Co. v. Lang* (1889), 118 Ind. 579, 581, 21 N. E. 317, said: “It may be true that the intestate was bound to know of the danger from regular trains, running according to time-tables or rules, and yet not be true that he was bound to know that a wild or irregular train would be run over the road, and so run as to bring about a collision. The peril from the wild train he was not bound to anticipate, for the reason that, from the assurance impliedly contained in the special order assigning a designated duty to him, he had a right to assume, in the absence of counter-vailing facts, that, if he himself exercised care and diligence, the company would not send out a wild train without exercising ordinary care and diligence to prevent injury to him while traveling in the usual way to the place where he was called by the duty assigned him, and while performing that duty at the place designated. * * * The peril he was subjected to from the irregular train cannot be regarded as one of the ordinary risks incident to the service he had entered.”

We think that these holdings of the courts of our own State and of other jurisdictions warrant the statement that the rule governing cases of this character is as follows: “An employe of a master may at one and the same time occupy a dual position, or sustain a dual relation to his master, that is to say he may at the same time be a fellow-servant and an agent or representative of the master,” and that when so situated, if such employe, as the agent and representative of his master, negligently does that which it is the master’s duty to do, and which such employe under his employment as such agent or representative of his master is authorized to do, or negligently omits to do that which as such agent and representative of his master he is under obligation to do, and such negligent act of commission or omission results in injury to another servant of such common master, such master must respond in damages to such injured servant who has himself in no wise contributed to such injury.

The error of appellant’s contention lies in the fact that it ignores this dual relation which Mahoney sustained to his master. Mahoney as motorman is one person, and as such is clothed with certain duties and obligations to his master in the operation of the car, and Mahoney as master or vice-principal of his master is quite another person, with entirely different powers, duties and obligations under his employment and under the law. He, the same as the owner and general superintendent, may combine in himself both positions, and whether he acts as the one or the other depends on the service rendered, but this service is not necessarily *the actual*, the manual or physical service. As motorman he must obey orders, as master he requires none, but may, in fact must, make and give them. As motorman alone, Mahoney when he left siding No. 30 without advising the train dispatcher disobeyed the orders of his master; as master he simply ignored a former order, and substituted therefor another, his own judgment and discretion, and such act

under the law, being that of the master itself, it cannot escape the responsibility therefor. As master he could sit in his office and direct the taking out of any car, and control its movement along the entire line. The fact that he accompanies the car in person as motorman does not prevent him from exercising the same control.

Whether the service performed, which resulted in the injury, was in fact the service of a master or a coservant is not to be determined solely by the manual or physical service being rendered, but there may be a mental service also to be taken into account, one requiring the exercise of judgment, discretion, control or supervision. In this case there was the service of judgment, discretion and control in the sending out and operation (by operation we mean control of movement and not the manual or physical operation) of the car in question, which was the performance of the master's duty, and there was also the manual or physical operation of the car as motorman, and this was the duty of the servant.

In the sending out of the car in the first instance there could be no question but that Mahoney acted as master, and we think, for the same reasons, there can be no question but that he acted in such capacity at every stage of the movement of the car, where his judgment and discretion were exercised in causing the car to be moved either by his order and direction or by going on the car and moving it in person.

But even if it be conceded that, under the proof, Mahoney in leaving siding No. 30 acted as a coservant with plaintiff, the evidence is still sufficient, because there is evi-

15. dence tending to prove the other allegations of the complaint, which charge that Mahoney negligently took the car out in the first instance, and that this negligence was one of the proximate causes of the injury as charged. This being true, and being the act of the master,

the mere fact that another negligent act, which, under the proof, may have been that of a coservant, contributed to plaintiff's injury, would not defeat his right to recover, because it is well settled that "where the master's negligent act is a proximate cause of the injury he is responsible, the injured party being himself without fault, although the negligence of a fellow-servant may have concurred in bringing an injury upon the plaintiff." In this connection the language of Judge Elliott, in the case of *Cincinnati, etc., R. Co. v. Lang*, *supra*, at page 583, is applicable: "If the master's negligence is the principal cause of the injury, then he will not be absolved from liability, although the negligence of a fellow-servant may have concurred in causing the injury; so that, if it were true that the negligence that caused the collision was in part that of the persons in charge of the wild train, even then the appellant, under the case made by the complaint, would be liable. This conclusion is well fortified by authority." See, also, *Pennsylvania Co. v. McCaffrey*, *supra*; *Louisville, etc., R. Co. v. Berkey* (1894), 136 Ind. 181, 189, 35 N. E. 3; *Pennsylvania Co. v. Burgett* (1893), 7 Ind. App. 338, 341, 33 N. E. 914, 34 N. E. 650; *Lake Shore, etc., R. Co. v. Wilson* (1894), 11 Ind. App. 488, 491, 38 N. E. 343; *Cayzer v. Taylor* (1857), 10 Gray 274, 69 Am. Dec. 317; *Booth v. Boston, etc., R. Co.* (1878), 73 N. Y. 38, 29 Am. Rep. 97.

Appellant next complains of certain instructions. Number three, given by the court, is the first objected to. It is as follows: "If you believe from the evidence that
16. the defendant was guilty of the negligence charged in the amended complaint, or in any one of the paragraphs thereof, and that the injuries complained of were the natural consequence of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence should be regarded as the proximate cause of the injury." It is in-

sisted that this instruction is erroneous, because "it omits the factor of probability, which is essential in determining proximate cause." It is true the word "probable" does not accompany the word "natural" as frequently occurs, but we think the factor of probability of the consequence of the negligence is sufficiently embodied in the word "natural" itself, and the further qualifying words, "and such as might have been foreseen and reasonably anticipated as the result of such negligence." Evidently no harm could have resulted to appellant from the omission of the word "probable," in view of the other words contained in the instruction.

Instruction eight is next objected to. This instruction places on appellant the burden of proving that appellee knew of the incompetency of Mahoney. This burden

17. was on appellee, and the giving of the instruction was error. *Ohio, etc., R. Co. v. Dunn* (1894), 138 Ind. 18, 21, 36 N. E. 702, 37 N. E. 546; *Evansville, etc., R. Co. v. Duel* (1893), 134 Ind. 156, 33 N. E. 355; *Louisville, etc., R. Co. v. Sandford* (1889), 117 Ind. 265, 19 N. E. 770; *Indianapolis, etc., Transit Co. v. Andis* (1904), 33 Ind. App. 625, 72 N. E. 145; 1 Rice, Evidence §75.

In this case, however, we are unable to see where any harm could have resulted to appellant, or how the verdict was in any manner influenced by the instruction.

18. There was entirely sufficient affirmative proof to justify the jury in finding that appellee had no knowledge of the incompetency charged, and shown by the proof, and there was no proof whatever offered by either appellee or appellant to the contrary. Under such circumstances, the appellee on this question had made a *prima facie* case, which was not disputed by any other evidence offered, and it was not important on whom the burden of proof rested, and any instruction on the subject of the burden of proof as to such fact was necessarily harmless.

Instruction twenty-six, given by the court on its own

motion, is next objected to, for the reason that it told the jury that the ordering of the starting of the trains 19. and cars was the duty of the master. This instruction is as follows: "The court instructs you that in the operation of an electric street railway, by a railway corporation, the ordering of the starting of its trains or cars is an absolute duty of such corporation, that is the master, and when such company entrusts that duty to one of its officers or employes then such officer or employe, in discharging that duty is a vice-principal, and the act of such person in that respect is the act of the company, the master, and for his negligent acts in discharge of these particular duties the master is liable to any one, employe, or otherwise, who being himself free from fault, is injured thereby. You are further instructed that the running and operating its cars is not a duty of the master to the servant, and this not being the duty of the master, to the servant, whether it be motorman, conductor, or trainmaster, the operator upon its car is a fellow servant, and such master is not liable for injury to its employes who are his fellow servants for the negligent acts of such operator, where the master has used care and diligence in selecting competent servants; and these facts should be kept in your mind because it becomes important in determining your finding upon the issues made by the first and third paragraph of the complaint."

Instructions thirty, thirty-one and thirty-two are objected to for practically the same reason as that urged against twenty-six. What we have before said in this opinion, together with the authorities cited, furnishes our reason for thinking these instructions correct expressions of the law governing the case.

We have examined the instructions in the case with care, and all save number eight, from which no possible harm

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could have resulted, state the law of the case as favorable to appellant as the authorities would permit.

We find no error in the record harmful to appellant.

Judgment affirmed.

NOTE.—Reported in 96 N. E. 180. See, also, under (1) 25 Cyc. 1308; (2) 25 Cyc. 1305; (3) 31 Cyc. 417; (4) 3 Cyc. 399; (5) 26 Cyc. 1394; (6) 26 Cyc. 1422; (7) 38 Cyc. 1340; (8) 26 Cyc. 1435; (9) 38 Cyc. 1340; (10) 26 Cyc. 1454; (11) 26 Cyc. 1316; (12) 26 Cyc. 1076; (13) 26 Cyc. 1318; (14) 26 Cyc. 1316, 1321; (15) 26 Cyc. 1302; (16) 26 Cyc. 1496; (17) 26 Cyc. 1495; (18) 38 Cyc. 1809; (19) 26 Cyc. 1502. As to the non-allowance of an amendment that would debar the statute of limitations as a plea, see 51 Am. St. 430. As to who is a vice-principal and who a fellow-servant, see 75 Am. St. 584.

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[No. 7,652. Filed June 5, 1912.]

1. **APPEAL.—Assignment of Errors.—Waiver.**—An assignment of error is waived by failing to argue it or to cite authorities in its support. p. 594.
2. **TRIAL.—Verdict.—Sufficiency of the Evidence.**—If a complaint counts on the breach of a parol warranty, a verdict for plaintiff is not sustained by evidence showing the contract to have been in writing. p. 594.
3. **CONTRACTS.—Written.—Parol Evidence.—Admissibility.**—Where a contract is reduced to writing, it is the repository of the entire agreement between the parties, and cannot be added to nor varied by parol evidence. p. 596.
4. **CONTRACTS.—Definition.—Termination.**—A contract is an agreement between two or more persons, based on a sufficient consideration, to do or to refrain from doing some particular thing, and its obligations remain in force on the parties thereto until terminated by performance or in some other manner recognized by law. p. 596.
5. **SALES.—Contract.—Performance.—Subsequent Reduction of Contract to Writing.—Breach of Warranty.—Admissibility of Parol Evidence.**—Where a parol contract of sale or exchange has been fully performed on both sides, a bill of sale thereafter executed containing a recital of the terms of the pre-existing contract as the parties at the time understood and remembered them, although some evidence of the terms of such contract, was not the

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sole evidence thereof, so that in an action for breach of warranty parol evidence of the terms of the contract was admissible. p. 597.

6. **FRAUDS, STATUTE OF.—Contracts.—Memorandum.—Evidence.**—Written evidence is the only character of evidence admissible to establish a contract governed by the statute of frauds, and a written memorandum introduced in evidence is sufficient to establish the terms of such a contract regardless of whether it was made before or after the contract was performed. p. 599.
7. **APPEAL.—Review.—Harmless Error.—Instructions.**—The giving of an instruction which is not accurately worded is not cause for reversal where, in view of the evidence and other instructions given, the jury was not misled thereby. p. 599.
8. **SALES.—Breach of Warranty.—Counterclaim.—Fraud.—Instructions.**—In an action for breach of warranty of a horse sold to plaintiff in exchange for a stock of merchandise, where defendant filed a counterclaim based on alleged fraudulent representations of plaintiff relative to such stock of merchandise, an instruction which told the jury that if it found that the merchandise was traded on the basis of an inventory thereof delivered by plaintiff to defendant and on a basis of the prices therein contained and that plaintiff had told defendant's agent the kind and character of invoice and prices contained therein before the trade was consummated, its verdict should be for the plaintiff, was erroneous in that it was misleading and disregarded the alleged fraudulent representations in reference to the quality and fitness of such merchandise. p. 599.
9. **SALES.—Exchange of Property.—Fraudulent Representations.—Measure of Damages.—Pleading.—Proof.**—Where property is sold by fraudulent representations, the measure of damages recoverable is the difference between the value of the goods as they actually were and their value had they been as represented, and in such action the value of the consideration exchanged for the property is immaterial and need not be pleaded or proved. p. 601.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Walter D. Hunt against Marshall Smith and another. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Charles A. Cole, Albert H. Cole, Hillis & Braadfield, and *Charles P. Baldwin*, for appellants.

David E. Rhodes and *John F. Lawrence*, for appellee.

LAIRY, J.—Appellee brought this action in the court be-

low to recover damages from appellants for the breach of a parol warranty alleged to have been made by them in the sale or trade of a stallion. From the averments of the complaint it appears that appellee was the owner of a stock of goods of the value of \$2,500; that some time in January, 1909, he entered into a contract with appellants, whereby he agreed to deliver to them said stock of merchandise in exchange for a certain stallion, named Charlie, valued in the trade at \$1,200, an automobile, and \$500 in cash, and said trade was fully consummated by the delivery of the stock of goods to appellants and by the acceptance of the personal property and cash in exchange therefor by appellee. The complaint then charges that appellants at the time of the trade, and as a part of the consideration therefor, warranted that the horse Charlie was suitable and fit for breeding purposes; it also alleges a breach of this warranty and seeks to recover damages therefor.

The action of the court in overruling the demurrer to the complaint is assigned as error, but this assignment is

1. waived by a failure to argue it or to cite authorities in its support.

There was a trial by jury and a verdict and judgment in favor of appellee. Appellants' motion for a new trial was overruled, and this is assigned as error.

It is conceded by all parties to this appeal that the complaint counts on the breach of a parol warranty of the stallion. Appellants claim that the evidence in this

2. case shows without dispute that the contract for the sale of the stallion was in writing, and that it contains no warranty as to his breeding qualities. If this position of appellants is correct, the verdict is not sustained by the evidence and the judgment cannot stand. It is claimed, however, on behalf of appellee, that the contract under which the exchange of the property was made, rested wholly in parol and may be proved by parol testimony. This presents the first question for decision.

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On the question under consideration, appellee testified as follows: "There was no written contract entered into for the sale of the horse. I prepared a bill of sale, sent it to Mr. Smith and asked him to sign it and return it to me. I got it at least ten days after the sale was made; after I came into possession of the horse and Mr. Smith came into possession of his stock of goods. I took the paper to Amboy with me several days after the trade had been consummated and asked Smith to have it signed and attested by a notary and he told me there was no notary in town and I told him if he could not have it attested by a notary to sign it in the presence of witnesses and return it to me. In a few days I received the document. The bill of sale bears the date of the sale. I had him to sign it to get something to show that I had a clear title to the horse, which I did not have at the time, although I had possession of the horse. The trade was closed on the 14th day of January. The bill of sale was not handed to Smith until after the horse was delivered to me."

The witness then identified the following bill of sale as given for the horse in controversy in this action, and appellants introduced it in evidence:

"Bill of Sale. I, the undersigned, Marshall Smith, of Amboy, Indiana, owner of the Percheron Stallion 'Charlie', 9402, for the sum of twelve hundred (1200) dollars worth of mdse. for the receipt of which is hereby acknowledged, have bargained and traded and by these presents do bargain, trade, transfer and convey the said Percheron Stallion, 'Charlie', 9402, to Walter D. Hunt of Gas City, Indiana, and I do for myself and my heirs and assigns warrant and defend the title to said Stallion to be free and clear from any and all incumbrances of every description what-so-ever, and I also warrant the said grey Stallion traded to the said Walter D. Hunt to be the same Stallion as the Stallion described as Charlie, 9402, in a certificate of pedigree issued by the American Percheron Registry Association, dated at LaGrange, Cook County, Illinois, the 27th day of September, 1906. Dated this 14th day of January, 1909. Marshall Smith."

After the bill of sale was introduced in evidence, appellants objected to the introduction of any testimony tending to show a parol warranty of the horse, on the ground that the contract for the sale of the horse was in writing, and contained certain specified warranties, and that parol evidence was inadmissible to vary the terms of this written contract. It is well settled that where a contract is

3. reduced to writing by the parties, all prior and contemporaneous parol negotiations are merged in this written contract. The writing is the repository of the entire agreement between the parties, and cannot be added to nor varied by parol evidence. *Reynolds v. Louisville, etc., R. Co.* (1896), 143 Ind. 579, 40 N. E. 410; *Shirk v. Mitchell* (1894), 137 Ind. 185, 36 N. E. 850; *Diven v. Johnson* (1889), 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308.

If the bill of sale introduced in evidence is a written contract within the meaning of the rule above recited, it must necessarily follow that the court erred in admitting testimony as to a parol warranty entered into prior to the execution of the bill of sale; but if the circumstances under which the bill of sale was executed were such as to show that it was not intended to embody the terms and conditions of the contract between the parties by which they were to be governed and controlled in carrying out their contract, then the rule would not apply. A contract has been defined

4. to be an agreement between two or more persons, based on a sufficient consideration, to do or to refrain from doing some particular thing. By the terms of a contract, whether written or in parol, the parties become obligated to do or to perform the acts stipulated on their part to be performed, and these obligations remain in force on the parties to the contract until the contract has been terminated in some manner recognized by law. When the contract has been terminated, both parties are thereby released from all obligations thereunder. One of the recognized means of terminating a contract is by performance, and

when a contract has been fully performed, all parties are released from any further obligations thereunder, and the contract ceases to exist.

In this case it appears from the evidence that a contract of some kind was entered into between the parties in reference to an exchange of personal property. In pur-

5. suance of this contract, appellee delivered to appellants a stock of goods, and appellants paid appellee \$500 in cash, and delivered to him an automobile and the horse. The contract was thus fully performed on both sides, and was thereby terminated. No written evidence of the contract existed at or before the time of its termination. All of the acts done by both parties, in carrying out the contract in question, were done in pursuance of a contract, the terms of which at the time rested entirely in parol. The bill of sale introduced in evidence was executed at a time after the contract had been terminated, and when there was no contract between the parties which could be merged into a written instrument. It was not, therefore, a written contract. At most it could be nothing more than a statement in writing of the terms of a preëxisting parol contract, which had been fully performed and terminated. If this bill of sale had been executed while the contract was still subsisting, and before it had been terminated by complete performance, it would then have constituted the sole repository of the agreements between the parties, and would have been the only evidence of the terms of the contract.

The bill of sale introduced in evidence was prepared by appellee and signed by appellant Smith. It contained a recital of the terms of the preëxisting verbal contract, as the parties at the time understood and remembered them. It was some evidence of the terms of the parol contract which had been previously performed and terminated, but it was not the sole evidence of such contract, as would have been the case had it been executed while the contract was still subsisting and unperformed. Suppose that a horse is sold,

delivered and settled for under the terms of a parol contract which provides for no warranty, and that afterwards the seller gives to the purchaser a written bill of sale containing a warranty as to the soundness of the horse. Such a warranty, having no consideration to support it, would not be binding on the seller, and it is quite apparent, we think, that he would not be precluded from showing by parol that the writing containing the warranty was executed after the contract of sale had been terminated by performance, and that the parol contract of sale did not provide for such a warranty. 2 Mechem, Sales §1247; *Summers v. Vaughan* (1871), 35 Ind. 323, 9 Am. Rep. 741; *C. Aultman & Co. v. Kennedy* (1885), 33 Minn. 339, 23 N. W. 528, *McGaughey v. Richardson* (1889), 148 Mass. 609, 20 N. E. 202.

We are of the opinion, therefore, that the contract under which the parties acted, as disclosed by the evidence in this case, rested in parole, and that the court did not err in admitting parol testimony as to its terms.

Our attention is called to the cases of *Claypool v. Jaqua* (1893), 135 Ind. 499, 35 N. E. 285, and *Moore v. Harrison* (1901), 26 Ind. App. 408, 59 N. E. 1077, and counsel for appellants claim that these cases announce a principle at variance with the conclusion reached in this case. Both of these cases involved contracts made in consideration of marriage. Such contracts fall within the provisions of our statute of frauds, and can be proved only by some note or memorandum signed by the party to be charged. §7462 Burns 1908, §4904 R. S. 1881; *Flenner v. Flenner* (1868), 29 Ind. 564; *Brenner v. Brenner* (1874), 48 Ind. 262; *Claypool v. Jaqua, supra*. In each of the cases cited and relied on by appellants, the contract in consideration of marriage was entered into by parol prior to marriage, and after marriage a written memorandum evidencing the terms of the contract was prepared and signed by the party to be charged. It was held in each of these cases that the written memorandum, prepared and signed after the marriage, furnished the

written evidence of the contract required by the statute of frauds. All parol evidence was excluded, because such contracts cannot be established by parol testimony; they must be established entirely by written evidence as required by the statute.

Where an action is brought to enforce a contract governed by the statute of frauds, a written memorandum, evidencing the terms of such contract, introduced in

6. evidence at the trial, is sufficient to establish it, regardless of whether such memorandum was made before or after the contract was performed. What the statute requires to establish such contracts is written evidence, and no other character of evidence is admissible. When the contract sought to be enforced is not governed by the statute of frauds, however, this rule does not apply. The contract sued on in this case is not governed by the statute of frauds, and for this reason the cases relied on by appellant are not controlling.

Appellants do not contend that the evidence introduced at the trial of this case is insufficient to show a parol warranty. Their sole contention on this point, as we understand it, is that the written bill of sale introduced in evidence does not establish the warranty pleaded, and that parol evidence was inadmissible for such purpose. What we have already said disposes of this contention.

Appellants object to certain instructions given to the jury at the trial. The first one objected to is instruction one, given by the court of its own motion. This in-

7. struction is, in the main, correct, although it is not very accurately worded. In view of the evidence and the other instructions given, we think that the jury was not misled thereby.

Instructions eight and ten, given at the request of appellee and objected to by appellants, are both clearly erroneous.

8. These instructions relate to the counterclaim of appellants, which was based on the alleged

fraudulent representations of appellee in reference to the stock of merchandise traded to appellants. The representations alleged to be false and fraudulent were: (1) That the stock of clothing was fresh, new, up to date, of the prevailing fashion and suited to the market and adapted to the trade at Amboy; (2) that the invoice of said stock of clothing, produced and exhibited to appellants' agent to induce the sale, was a true and correct invoice of said stock of goods, and that the values therein shown were the true and correct values of such goods at wholesale.

Instruction eight is as follows: "If you find from the evidence that the goods in question and referred to in the cross complaint and counter claim were traded to the said defendant Hardware Company on the basis of an inventory thereof delivered by plaintiff to said defendant or its agent and upon the basis of the prices therein contained and that the plaintiff told its said agent the kind and character of invoice and prices contained therein before the trade was consummated, then in such case your verdict should be for the plaintiff, Walter D. Hunt, on the cross complaint or counter claim." Under this instruction, if the jury found that the stock of merchandise was traded on the basis of an inventory, and that plaintiff told defendants' agent the kind and character of the invoice and the prices contained therein, then there could be no recovery on the counterclaim. If this were the law, there could be no recovery on the counterclaim, even though the jury found that the inventory was false as to the quantity of goods, and that the prices stated therein were not the correct wholesale prices of such goods, and further found that plaintiff fraudulently represented that the invoice was true and correct, both as to the quantity of the goods and the prices stated, and all other facts essential to a recovery on this theory. Appellee contends that the instruction was intended to mean, and that the jury understood it as meaning, that there could be no recovery on the counterclaim, if the stock of merchandise was traded

on the basis of an invoice and the prices therein contained, and that the plaintiff correctly and truly stated to the agents of defendants the kind and character of the invoice and the prices contained therein. We are not satisfied that the jury so understood the instruction, at least, it is so uncertain in its meaning as to be likely to mislead the jury in this regard. The instruction is open to another objection. It disregards the alleged fraudulent representations in reference to the goods being fresh, new, up to date, of the prevailing fashion, and suited to the market and adapted to the trade at Amboy. The jury was authorized by this instruction to find against the defendants on their counterclaim, without giving any consideration to evidence tending to prove a cause of action for these alleged fraudulent representations. Even though the instruction were susceptible of the meaning claimed for it by appellants, its effect was to tell the jury that if appellee told the truth in one of the representations alleged to have been false and fraudulent, there could be no recovery, although other material fraudulent representations, alleged in the counterclaim, were proved by a preponderance of the evidence.

Instruction ten is as follows: "Before you can find for the defendant on its counterclaim, you must first find that the plaintiff made false statements and representations about the goods as alleged, and second, you must also find that the said defendant relied upon said statements and representations to its injury, and third, you must find the price and value given for the same and value of the same. If either one of these three facts are not shown, your verdict should be for the plaintiff, Walter D. Hunt, on the counterclaim." The jury was told by this instruction that before it could find for the defendants on the counterclaim in question, it must find the price and value given for the stock of goods, and if this were not shown, it must find for the plaintiff. In an action of deceit in this State, the value of the consideration exchanged for

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the property sold by alleged fraudulent representations is not a material fact, and need not be pleaded or proved. It was error, therefore, to require as a prerequisite to a verdict in favor of the defendants on their counterclaim that it should prove the price and value given for the goods in reference to which the alleged fraudulent representations were made. The measure of damages in such a case is the difference between the value of the goods as they actually were, and their value had they been as represented. The measure of damages is not the difference between the value of the goods and the consideration exchanged for them. *McAroy v. Wright* (1865), 25 Ind. 22; *Nysewander v. Lowman* (1890), 124 Ind. 584, 24 N. E. 355; *Brier v. Mankey* (1911), 47 Ind. App. 7, 93 N. E. 672.

For error in giving instructions eight and ten requested by appellee, the judgment is reversed, with directions to grant a new trial.

Judgment reversed.

NOTE.—Reported in 98 N. E. 841. See, also, under (1) 3 Cyc. 388; (2) 38 Cyc. 1884; (3) 9 Cyc. 763; 17 Cyc. 596; (4) 9 Cyc. 241; (5) 35 Cyc. 120; 17 Cyc. 734; (6) 20 Cyc. 317; (7) 38 Cyc. 1782, 1809; (8) 35 Cyc. 483; (9) 35 Cyc. 468. As to the rule generally respecting parol evidence to vary written instruments, see 56 Am. St. 659. As to parol evidence to modify or explain a bill of sale, see 19 Ann. Cas. 541.

SMITH v. ANDREW ET AL.

[No. 7,917. Filed June 5, 1912.]

1. STATUTES.—*Construction.—Legislative Intent.*—While statutes in derogation of the common law are to be strictly construed, the primary rule of construction is to ascertain and give effect to the intent of the statute. p. 605.
2. STATUTES.—*Construction.—Legislative Intent.*—In the construction of a statute, the intent, as gathered from an examination of the whole and all its parts, prevails over the literal import of particular terms when the strict letter of such terms would lead to injustice and contradiction. p. 605.

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3. PARTITION.—*Rights of Remaindermen.—Statute.—Construction.*

—The act of 1909 (Acts 1909 p. 339) providing that any person owning an undivided interest in fee simple in any lands and at the same time owning a life estate in the remaining portion of such lands or any part thereof, or the person owning the fee in such lands subject to such undivided interest in fee and such life estate in any such lands, may compel partition thereof, expressly abrogates the common law rule which required that the person seeking partition must be entitled to possession in addition to owning an interest in the land and thereby prevented the remainderman from obtaining partition as against the life tenant in possession, so that under said act an owner in fee of an undivided interest in land may have partition thereof although another not in possession holds an undivided interest in the life estate not coupled with an interest in the remainder. p. 606.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Thomas G. Smith against Riley Andrew and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Watkins & Butler, for appellant.

Fred H. Bowers and *Milo Feightner*, for appellees.

HOTTEL, C. J.—Appellant brought this action for partition of certain real estate in Huntington county, Indiana. Appellees filed a special answer to the complaint, and appellant's demurrer thereto was overruled. A demurrer was sustained to appellant's reply, and, on his refusal to plead further, judgment was rendered in favor of appellees and partition denied.

The errors assigned and relied on are as follows: (1) The court erred in overruling appellant's demurrer to appellees' answer; (2) the court erred in sustaining the demurrer to appellant's reply.

To a complaint for partition, the sufficiency of which is not questioned, appellees addressed a special answer, which, in substance, shows appellant and appellees, except Elizabeth Andrew, to be owners as tenants in common of the remainder in the real estate here involved; that Amy Andrew, former owner of a life estate in said property, has sold

one-eighth of the same to appellee Elizabeth Andrew and the balance to certain others of appellees. In reply to this answer, appellant averred that Elizabeth Andrew, the owner of the undivided one-eighth interest in the life estate of Amy Andrew, is the only person who owns any part of said life estate, and does not also own a part of the undivided remainder; that Elizabeth Andrew does not own any part of the undivided remainder and is not in actual possession of said real estate; that said Amy Andrew has long since sold all her interest in said real estate, and is not in possession thereof.

Appellant admits that prior to March 6, 1909, the law of Indiana did not permit partition by remaindermen while a life estate in the property was outstanding, but insists that the legislature on that date provided for partition of lands under such circumstances. The act of 1909 (Acts 1909 p. 339) is as follows: "When any person shall own an undivided interest in fee-simple in any lands, and at the same time shall own a life estate in the remaining portion of any such lands, or any part thereof, then in any such case, such person so owning such fee and life estate, or the person or persons owning the fee in such lands subject to such undivided interest in fee and such life estate in any such lands, may compel partition thereof and have such fee-simple interest in any such lands so held, set off and determined in the same manner as lands are now partitioned by law."

Prior to the above act the common-law rule prevailed in this State, viz., that "only one having both title and possession or the right of possession vested in him could maintain an action for the partition of real estate; that a remainderman could not maintain such action because he had title but not possession or the right of possession." *Tower v. Tower* (1895), 141 Ind. 223, 224, 40 N. E. 747. See, also, *Stout v. Dunning* (1880), 72 Ind. 343; *Coon v. Bean* (1880), 69 Ind. 474; *Schori v. Stephens* (1878), 62 Ind. 441, 448. In

some jurisdictions, however, this rule has been abrogated, and under particular statutes, which do not require the plaintiff to be in possession or entitled thereto, it has been held that a reversioner or remainderman may maintain partition against the owner of the remaining undivided interest in remainder or reversion, although the whole premises are subject to a life estate. *Scoville v. Hilliard* (1868), 48 Ill. 453; *Cook v. Webb* (1872), 19 Minn. 167; *Hayes v. McReynolds* (1898), 144 Mo. 348, 353, 46 S. W. 161; *Smith v. Gaines* (1884), 38 N. J. Eq. 65; *Drake v. Merkle* (1894), 153 Ill. 318, 38 N. E. 654.

While it is true that statutes in derogation of common law are to be strictly construed, it is equally clear that “the intent is the vital part, the essence of the law, and the

1. primary rule of construction is to ascertain and give effect to that intent.” 2 Lewis’s Sutherland, Stat. Constr. (2d ed.) §363. See, also, *Lime City Bldg., etc., Assn. v. Black* (1894), 136 Ind. 544, 545, 35 N. E. 829; *Board, etc., v. Board, etc.* (1891), 128 Ind. 295, 27 N. E. 133.

As was said in *Lime City Bldg., etc., Assn. v. Black*, *supra*, at page 555: “The intent of a statute, as collected from an examination of the whole and all its parts,

2. will prevail over the literal import of particular terms, and control the strict letter of such terms when the letter would lead to injustice and contradictions.”

It has also been said that “the mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. ‘While the intention of the legislature must be ascertained from the words used to express it, the manifest

reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words.' '' 2 Lewis's Sutherland, Stat. Constr. (2d ed.) §376, and cases cited.

Previous to the passage of the act of 1909, the right of the owner of a life interest in an undivided part of real estate to have partition had been recognized. *Shaw v. Beers* (1882), 84 Ind. 528, 529. And it had also been held that tenants in common of a life estate might compel partition. *Hawkins v. McDougal* (1890), 125 Ind. 597, 25 N. E. 807. The position of the remainderman was, however, not so favorably defined, for it was the rule that although owners of the remainder interest in real estate could not, as plaintiffs, compel partition, they might be made defendants, and be bound by the decree in partition proceedings. *Swain v. Hardin* (1878), 64 Ind. 85; *Lynch v. Leurs* (1868), 30 Ind. 411.

The evident purpose of the legislature in passing the act of 1909 was to make it possible for remaindermen, under certain conditions, to have partition of the property

3. in which they owned an interest, and to have such interest set off to them in severalty. While the language used in this act is susceptible of the construction contended for by counsel for appellees, viz., that the act was special in character and passed to meet the needs of some particular case, such a construction would put a limitation on the legislative intent which is not clearly apparent from the wording of the act, and would be out of harmony with a more liberal trend found in the statutes of other states. On the other hand, we need not and do not decide that the intent of the legislature was to give the remainderman the right of partition as against the life tenant owning the entire life estate.

The act of 1909 was intended to apply to all cases where the life estate has itself, by conveyance or otherwise, been partitioned, and where one or all of several remaindermen had become possessed of a part or all of a life interest in

lands in which he also held an undivided interest in fee. The purpose of the legislature was to permit such owners in common of the fee to have partition of the real estate, and this we hold to be the effect of the act. The essential and controlling feature of the common law was that which required the person seeking partition to be entitled to possession in addition to owning an interest in the land, thereby preventing the remainderman from obtaining partition as against the life tenant in possession. The act here involved expressly abrogates this rule, and extends the right to partition from the person entitled to possession to those standing on an equal footing with him, save for his possessory rights.

Counsel for appellees, however, insist that, in this case at least, appellant is not entitled to partition, for the reason that one of the owners of the life estate has no interest in the fee, and that partition might work a hardship on her.

The right to partition being clearly and expressly given to the remainderman by the act of 1909, we think it would be in violation of both the intent and spirit of the act to permit the right so given to be defeated, because one not in possession happens to hold an undivided interest in the life estate not coupled with an interest in the remainder. If, as in this case, partition may be defeated because an undivided one-eighth interest in the life estate is held by one who happens to own no part of the remainder, then such an independent interest in the life estate, however small, may have the same effect, and in this way the purpose of the statute be entirely defeated. Furthermore, the value of a life interest in lands may ordinarily be readily computed, and we see no reason why injustice need result in a situation such as the one before us, especially since it appears that the owner of the one-eighth interest in the life estate is not in possession of the lands here involved or any part thereof.

Appellant is clearly within the intent of the act of 1909,

Federal Cement Tile Co. v. Korff—50 Ind. App. 608.

Action by Walter Korff against the Federal Cement Tile Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William J. Whinery, for appellant.

F. N. Gavit and *J. E. Westfall*, for appellee.

ADAMS, J.—Action by appellee against appellant for damages on account of personal injuries alleged to have been sustained by appellee while in the employ of the appellant, and through its negligence.

Appellee was employed by appellant as a workman in laying tile on a certain roof, and while acting in the course of his said employment he was required to go on the roof and lay cement tile thereon. The roof was not solid or firm, but consisted of iron girders laid four feet apart, on which appellee was required to lay said tile, and before the placing of such tile thereon, there was no other material on said roof, except said iron girders, which were so placed that a space of four feet between each girder was left uncovered. The tile which appellee was engaged in laying were each seven eighths of an inch in thickness, two feet in width and four feet in length, and were constructed of cement or concrete set upon and built over a wire netting, placed therein to add strength to the same. In the laying of said tile, appellee was required to and did, when any tile was laid in said roof, stand upon the same while laying other and additional tile thereon.

The complaint charges appellant with negligence as follows: “That defendant carelessly and negligently furnished plaintiff, for use on said roof, a certain tile of the dimensions above given, which had no wire netting or screen or wire of any kind in the same; that said tile without such wire therein was too weak to sustain the weight of a man thereon; that the absence of such wire in said tile was well known to the defendant and unknown to the plaintiff; that plaintiff could not have discovered the absence of such wire

in said tile by reasonable inspection at any time before said injury; that on the 16th day of October, 1907, plaintiff was engaged in laying tile on said roof, and did lay said tile which did not contain any wire upon said roof, and in the course of his said employment did stand upon said defective tile, for the purpose of laying other tile upon said roof, and while so standing upon the same, the said tile, because of the absence of such wire therein, was too weak to sustain plaintiff's weight, and did break and permit plaintiff's body to fall through the same, and the hole made thereby in said roof, and to fall to the floor of the building underneath said roof, a distance of twenty-five feet."

The complaint concludes by detailing the nature and extent of the injuries sustained by appellee, and the damages resulting from said injuries.

A motion for a change of venue from Lake county, supported by affidavit, was filed by appellant, and denied by the court, on the ground that the same was not filed within the time provided by rule ten of the Lake Superior Court. Appellant thereupon asked leave to file an amended affidavit in support of its motion for a change of venue, which the court also refused. Exceptions were duly taken to each of these rulings. A demurrer to the complaint for want of sufficient facts was then filed, which demurrer was overruled, and the cause put at issue by answer in general denial. Trial by jury, and general verdict for appellee in the sum of \$700.

Answers to interrogatories were returned with the general verdict, and appellant moved for judgment in its favor on such answers to interrogatories, notwithstanding the general verdict. This motion, together with the motion for a new trial, was overruled, and judgment rendered on the verdict.

Errors assigned and relied on call in question the action of the trial court in overruling the demurrer to the complaint, the motion for judgment on the answers to the interrogatories, and the motion for a new trial.

It is urged that the complaint does not state a cause of action, in that there is no averment that appellee did not have knowledge of the defect in the tile prior to his injury and that the dangers being shown to be open and obvious, appellee must be considered as having assumed all risks incident to his employment.

It will be observed that the particular negligence charged in the complaint, and on which appellee bases his right to recover, is the failure of appellant to furnish him

1. safe material with which to work. Appellant had furnished a defective tile, one which did not have moulded into it any metal reënforcement, and was therefore too weak to sustain the weight of a man thereon. In the prosecution of his work, it was necessary for appellee to stand on this defective tile, while laying other tile. "That the absence of such wire in such tile was well known to the defendant, and unknown to the plaintiff." While it is true that an employe assumes the risk from open and obvious defects and dangers, such as would be known by the exercise of ordinary care, yet as a matter of pleading, an averment that he did not know of such defects or danger is sufficient not only to rebut or repel actual knowledge, but also implied or constructive knowledge. *Baltimore, etc., R. Co. v. Roberts* (1903), 161 Ind. 1, 7, 67 N. E. 530; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 300, 53 N. E. 235; *Louisville, etc., R. Co. v. Miller* (1895), 140 Ind. 685, 686, 40 N. E. 116; *Chicago, etc., R. Co. v. Richards* (1901), 28 Ind. App. 46, 55, 61 N. E. 18; *Columbian Enameling, etc., Co. v. Burke* (1906), 37 Ind. App. 518, 521, 77 N. E. 409, 117 Am. St. 337. We think the complaint states a cause of action, and there was no error in overruling the demurrer thereto.

It is next insisted that, as shown by the evidence, the tile was manufactured by appellant, and the omission of the metal reënforcement from the particular tile which caused the injury was the act of a fellow servant of appellee, em-

ployed by appellant in the same general enterprise. There is no merit in this contention. It is the duty of the

2. master to provide safe materials and appliances, and that duty is a continuing one, and one which appellant could not delegate to an employe in such a manner as to relieve it from responsibility. It was the duty of

3. the master in this instance to provide appellee with roof tile of sufficient strength to enable him to lay the same in the usual manner, and without danger to himself. Appellant being a corporation, this duty was of necessity delegated to some natural person or persons, but the placing of the metal reënforcement in the cement tile, while in process of manufacture, was the duty of the master. The employe to whom such work was assigned, no matter what his rank or grade might be, would be a principal, and not a fellow servant, as to exempt the master from liability. *Standard Oil Co. v. Bowker* (1895), 141 Ind. 12, 18, 40 N. E. 128; *Indiana, etc., R. Co. v. Snyder* (1895), 140 Ind. 647, 654, 39 N. E. 912; *Louisville, etc., R. Co. v. Berkey* (1894), 136 Ind. 181, 190, 35 N. E. 3; *Indiana Car Co. v. Parker* (1885), 100 Ind. 181, 191, and cases cited.

One of the causes assigned for a new trial was that the court erred in refusing to grant a change of venue on the motion of appellant, supported by affidavit of the at-

4. torney for appellant, made for and on behalf of appellant, at its request and by its authority. The affidavit sets out one of the causes provided by statute for change of venue, and also states "that said defendant did not know of said local prejudice existing against said defendant's defense to said cause of action, until the 6th day of February, 1908; that as soon as defendant was informed of the conditions and facts relative to the defense in said cause as aforesaid, it instructed affiant as its attorney in said cause to take the necessary steps to secure for it a change of venue from said Lake County." The court refused to grant the change of venue, on the ground that the

same was not filed within the time provided by rule number ten of the Lake Superior Court. Appellant then asked leave to amend said affidavit, to which appellee objected, and appellant thereupon tendered an amended affidavit for change of venue from the county, which the court refused to receive or permit appellant to file. To each of which rulings appellant excepted, and was given time to prepare and file a special bill of exceptions.

It appears from this bill of exceptions that rule ten of the said court provides that application for a change of venue from the county must be made at least three days before the case is set for trial, except when the reason for the change is not known within the time specified. The motion must be made as soon as possible after such reasons have become known to the applicant, and this must be shown by affidavit setting forth such reasons in full. It also appears that the case was originally set for trial on February 7, the same day on which the motion for a change of venue was made, but that by reason of the great number of cases set and undisposed of there was no possibility of reaching the trial of this case for several weeks.

The amended affidavit is substantially the same as the original, except the reasons for appellant's failure to file the affidavit within the time provided by the rule are shown in greater detail. We think the original affidavit was sufficient, and that the court erred in refusing to grant the change of venue as therein prayed. The affidavit sets out a statutory cause for a change of venue, and states facts clearly relieving appellant of the rule of court. The right of a party to a change of venue in civil actions is given by statute for certain enumerated causes, at least one of which must be shown by affidavit. §422 Burns 1908, §412 R. S. 1881.

A rule of court may regulate the manner and time
5. of making the application, but such rule cannot
abrogate the right or prevent its exercise. A statu-

tory right cannot be made to yield to a rule of court.

Parties are required to take notice of the rules of
6. court, and where there is knowledge of the facts on which the right to a change of venue is predicated, in time to comply with the rule, failure to make application within the time will be deemed to be a waiver of the right. But where the facts are unknown to a party within the time fixed by the rule for making the application, such party will not be deemed to have waived the right. *Ogle v. Edwards* (1893), 133 Ind. 358, 33 N. E. 95; *Bernhamer v. State* (1890), 123 Ind. 577, 24 N. E. 509; *Rout v. Ninde* (1889), 118 Ind. 123, 20 N. E. 704; *Moore v. Sargent* (1887), 112 Ind. 484, 14 N. E. 466; *Shoemaker v. Smith* (1881), 74 Ind. 71; *Krutz v. Howard* (1880), 70 Ind. 174.

A motion for a change of venue, supported by affidavit, filed after the time fixed by rule of court, cannot be denied, where the affidavit shows that knowledge of the facts on which the application for the change is based was not acquired until after the expiration of the time designated by the rule. Nor can the applicant for a change be re-

7. quired to show that he was diligent in his efforts to ascertain within the time fixed by the rule if conditions existed affecting his right to a fair and impartial trial. *Spencer v. Spencer* (1894), 136 Ind. 414, 416, 417, 36 N. E. 210.

The statute imperatively requires the court to grant a change of venue in civil actions, where the application is made in conformity with the provisions thereof. The

8. affidavit in this case conformed to the requirements of the statute. *Louisville, etc., R. Co. v. Martin* (1897), 17 Ind. App. 679, 681, 47 N. E. 394.

The recent case of *Advance Vencer, etc., Co. v. Hornaday* (1911), 49 Ind. App. 83, 96 N. E. 784, is not in conflict with the rule herein declared. That was a case in which the parties had full knowledge of the facts entitling them to a change of venue, but claimed to have no knowledge of the rule of

court. In this opinion, it is expressly held that parties are required to take notice of the rules of court in which their actions are pending.

But notwithstanding the error of the court in denying the motion for a change of venue from the county, we think the error was harmless. The cause was tried by a

9. jury, beginning on June 12, 1908, and resulted in a disagreement. No further motion was made by appellant for a change of venue. The cause was again tried, beginning on December 2, 1908, and from a judgment rendered on the verdict in favor of appellee, this appeal was taken.

We judicially know that a full term of the Lake Superior Court intervened between the first and second trials, and there was ample opportunity for appellant to ask for

10. a change of venue from the county, had it still desired such change. It will be noted that the motion for a change was denied, on the ground that the same was not made within the time provided by the rules of court. After the mistrial, no rule of court interfered, and appellant might, by filing a formal affidavit, setting up a single statutory cause, have been granted a change of venue from the county. From the fact that no further effort was made to remove the cause, we must conclude that appellant was satisfied to submit the same to a jury of Lake county, and that the error of the court, made prior to the February trial, did not prejudice appellant as to its subsequent rights. An erroneous ruling on a motion for a change of venue should be harmful, to justify a reversal. *Goodwin v. Bentley* (1903), 30 Ind. App. 477, 481, 66 N. E. 496.

Appellant further predicates error on the action of the court in overruling its motion for judgment on the answers

to the interrogatories, notwithstanding the general
11. verdict. With its general verdict, the jury returned answers to 119 interrogatories, covering fully the facts in the case. It would unduly extend this opinion to

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consider these matters in detail. It is sufficient to say that no irreconcilable conflict is shown between the answers to the interrogatories and the general verdict.

The judgment is affirmed.

NOTE.—Reported in 97 N. E. 185. See, also, under (1) 26 Cyc. 1397; (2) 26 Cyc. 1104; (3) 26 Cyc. 1318; (4) 40 Cyc. 150; (5) 40 Cyc. 147; 11 Cyc. 742; (6) 40 Cyc. 124, 147; (7) 40 Cyc. 157; (8) 40 Cyc. 167. As to knowledge of the danger as basis of the assumption of risk rule, see 131 Am. St. 437. As to the duty of an employer to furnish safe appliances and places, see 33 Am. St. 746; *Brazil Block Coal Co. v. Gibson* (Ind.), 98 Am. St. 289. As to servant's assumption of obvious risks of hazardous employment, see 1 L. R. A. (N. S.) 272. For assumption of risk of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see 28 L. R. A. (N. S.) 1250. On the question of vice-principalship considered with reference to rank of superior servant, see 51 L. R. A. 513. And for vice-principalship as determined with reference to character of act causing injury, see 54 L. R. A. 37.

HUGHES ET AL. v. STATE OF INDIANA, EX REL. SUTTON.

[No. 7,651. Filed June 6, 1912.]

1. APPEAL.—*Briefs.—Statement of Evidence.—Defective Statement Cured by Appellee's Brief.*—Although a statement of the evidence in appellants' brief is an insufficient compliance with rule twenty-two to present any question on the evidence for review, the question is presented where such defective statement is remedied by appellee's brief. p. 619.
2. INTOXICATING LIQUORS.—*Unlawful Sales.—Action on Bond of Saloon-keeper.—Intoxication.—Evidence.—Sufficiency.*—In an action on the bond of a saloon-keeper brought under §8355 Burns 1908, §5323 R. S. 1881, for injury to plaintiff's means of support resulting from the unlawful sale of liquor to plaintiff's father, where the evidence showed that the sales of liquor were unlawful, that decedent, who, when not drinking, was a peaceful and lawabiding citizen, drank approximately sixteen glasses and one bottle of beer and four drinks of whisky between nine a. m. and three p. m. of the same day, that he became noisy and quarrelsome and attempted to strike others with a bottle of beer, for which he was put out of the saloon, that from the saloon he

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went to a dancing platform and thence to a ball game, where he interfered in a fight and engaged in combat with the deputy marshal in which he was killed, the evidence sufficiently showed that decedent was so much intoxicated that he had lost control of himself and for that reason resisted the officer who killed him, so as to authorize a recovery by plaintiff. p. 619.

3. **INTOXICATING LIQUORS.—Unlawful Sales.—Action on Bond of Saloon-keeper—Facts Essential to Recovery.—Proximate Cause.**—In an action on the bond of a saloon-keeper under §8355 Burns 1908, §5323 R. S. 1881, for injury to means of support resulting from intoxication produced by liquor unlawfully sold it is essential to a recovery by plaintiff that besides the sale or gift of liquor, intoxication from its use in whole or in part and a resulting injury to plaintiff's means of support must be shown, but it is not necessary to show that the sale of liquor was the proximate cause of the injury. p. 622.

From Jefferson Circuit Court; *Hiram Francisco*, Judge.

Action by the State of Indiana on the relation of Luther Sutton against William Hughes and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

George S. Plcasants, Korbly & New, for appellants.

E. E. Winn, P. E. Bear and F. M. Griffith, for appellee.

IBACH, J.—This was an action under §8355 Burns 1908, §5323 R. S. 1881, by relator Luther Sutton, a minor, on the bond of appellant Hughes, as a licensed saloon-keeper, to recover damages sustained by reason of his selling liquor unlawfully to Charles Sutton, father of relator. The substance of the charge in the complaint is that on July 4, 1906, appellant Hughes sold liquor to Charles Sutton when the latter was intoxicated, which Sutton drank, and from the effects of which he became more thoroughly intoxicated, irritable, uncontrollable and unable to distinguish right from wrong, and that while in said state of intoxication, and wholly by reason thereof, he attempted to resist the deputy marshal of the town of Patriot, Indiana, in making an arrest, and was shot and killed by said deputy marshal, and thus relator was deprived of his sole means of support. Relator recovered judgment for \$1,800 on trial by jury.

The only alleged errors which appellants attempt to present are that the verdict is not sustained by sufficient evidence and is contrary to law. The statement of the

1. evidence in appellants' brief is not full, omitting many matters, and consists largely of conclusions of counsel as to the effect of the evidence, rather than a condensed recital of the evidence itself. Appellants' brief would be, in this respect, insufficient to bring before us the questions sought to be presented, under rule twenty-two of the Supreme and Appellate courts, had not defects been remedied by appellee's brief.

Appellants urge that appellee must prove not only that Hughes sold liquor to decedent when he was intoxicated, and that he drank this liquor and became more in-

2. toxicated, but also that he was intoxicated to such an extent that he was wholly unable to reason and understand for himself at the time he resisted the deputy marshal, and that the deputy marshal shot him because he undertook to resist him in making an arrest, and for no other reason.

There was a Fourth of July celebration in progress in Patriot on the day Sutton was killed, and he, a citizen of Kentucky, had crossed the Ohio river and come to Patriot in the morning in order properly to celebrate the day. The evidence is uncontradicted that Hughes was doing a "land-office business" selling liquor in the back room of his saloon, that Sutton drank in that room many times with several different persons, and that Hughes sold to him liquor in the forenoon when he was intoxicated. There is also evidence that he sold him liquor in the afternoon, and about 3 o'clock put him out of the room, because he was noisy and quarrelsome, and was threatening to use a bottle of beer as a club over some of his companions' heads. The evidence, taken as a whole, tends to show that between 9 a. m. and 3 p. m. he drank approximately fifteen or sixteen glasses and one bottle of beer, and four drinks of whisky,

and that his drinking continued up to within thirty minutes of the shooting. After leaving the saloon Sutton went to a dancing platform and danced awhile, some of the witnesses stating that he was drunk at this time, while others insisted that he was not drunk or he could not have danced, and then we find the startling statement of one witness that all the men who were dancing were "full". There appears to have been some disagreement and misapprehension in the minds of the witnesses as to the meaning of the words "drunk" and "intoxicated." Practically all of them state that Sutton was under the influence of liquor, but many of them hesitate to say that he was "drunk" or "intoxicated," and some of them explain what they understand by "drunk" in such a manner that the inference is they did not consider a man "drunk" until he had lost the power of locomotion, and had laid himself down to rest in some convenient gutter. After leaving the dancing platform, Sutton went to watch a ball game near by. Shortly after, between 3:30 and 4 o'clock, Joe Taylor, another Kentuckian, who had partaken too freely of unlawfully sold liquor, became engaged in a fight, and was arrested by the officers. The ball game was stopped, the crowd surrounded them, some favoring the officers, others calling out, "Don't let them take Joe Taylor." The officers drew their revolvers, and ordered the crowd back, and they all stood back except Sutton and perhaps one other. Sutton rushed in and engaged in combat with the deputy marshal, who shot him, as he says, in self-defense. It was shown by the testimony of at least eight witnesses that Sutton, when not drinking, was a peaceful, law-abiding citizen, and this testimony was not contradicted. Appellant Hughes testifies that he knew that every sale of liquor he made that day was in violation of law, and that his bondsmen would be liable for injuries caused thereby, yet he "took the chances".

The defense attempted to show the existence of ill-feeling between Sutton and the deputy marshal Smith, who shot

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him, and one witness testified that some fourteen years before Sutton testified against Smith at a trial when the latter had been arrested for a "cutting scrape", and Smith had said he would get even, and that at one time Smith and Sutton had been "mixed up on different sides" in a quarrel over a dog, which had taken place in an alley in Patriot. This evidence, even if it were not directly contradicted, would be insufficient to overthrow the verdict, in the face of the other evidence. Furthermore, the credibility of the witness who thus testified was attacked, and Smith himself testified that there had been no ill feeling at any time between himself and Sutton, that nothing had ever happened at all that caused any ill feeling between them, and that he shot him solely in self-defense.

Smith testified that he had been warned before the Fourth that some Kentuckians had been talking for two weeks that if the officers undertook to arrest any one from Kentucky they would put the officers in the river. However, it was shown that the persons concerned in this lived in an entirely different neighborhood from Sutton, and it was not shown that he had any communication with them, or any connection with their alleged plot. There remains the testimony of one witness, however, who said that Sutton told him before he crossed the river the morning of the Fourth, that if the officers attempted to arrest any Kentucky boys he would put them in the river. The testimony of this witness is not consistent on its face, and counsel for plaintiff at the trial argued that it was unreasonable, untrue and manufactured, and the jury in weighing his testimony may well have rejected it wholly.

The evidence, a portion of which has been related, is sufficient for the jury to find that Sutton at the time he was shot was so much intoxicated that he had lost control of himself, and for that reason, and no other, resisted the officer.

The Standard Dictionary defines "intoxicated" as

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“drunk”, and “drunk” as “Under the influence of intoxicating liquor to such an extent as to have lost the normal control of one’s bodily and mental faculties, and, commonly, to evince a disposition to violence, quarrelsomeness, and bestiality.” It is apparent from the testimony of those very witnesses who did not consider Sutton drunk because he was still able to walk and dance, that he was under the influence of liquor to such an extent as to have lost control of himself in certain ways, and to have become quarrelsome, and to show that he was intoxicated within the meaning of the above definition.

We think the evidence sufficient to show that the sales of liquor to Sutton by Hughes were the proximate cause

3. of his death. See *Currier v. McKee* (1904), 99 Me. 364, 59 Atl. 442, 3 Ann. Cas. 57 and note.

However, this is not necessary under our decisions. “Under the act it is necessary that two facts should concur besides the sale or gift of the liquor by the defendant to constitute a cause of action, to wit, intoxication resulting from its use in whole or in part, and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more. * * * The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication. It only requires that it should be established that the loss of the means of support is the result of such intoxication. * * * The statute provides for a recovery by action for injuries to person or property or means of support, without any restriction whatever, and * * * both direct and consequential injuries were included; * * * it is evident that the legislature intended to go, in such a case, far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in the producing or who caused such intoxication. * * * The question was not whether the death of the deceased was the natural, reasonable, or probable conse-

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quence of the defendant's act; but it was enough if intoxication, caused in whole or in part by liquor sold by the defendant, was the cause of the death of the plaintiff's husband, if by reason thereof the plaintiff's means of support were injuriously affected." *Homire v. Halfman* (1901), 156 Ind. 470, 60 N. E. 154. See, also, *McCarty v. State, ex rel.* (1904), 162 Ind. 218, 70 N. E. 131; *State, ex rel., v. Terheide* (1906), 166 Ind. 689, 78 N. E. 195; *Dudley v. State, ex rel.* (1907), 40 Ind. App. 74, 81 N. E. 89; *Berkemeier v. State, ex rel.* (1909), 44 Ind. App. 1, 88 N. E. 634; *Greener v. Niehaus* (1909), 44 Ind. App. 674, 89 N. E. 377; *United States Fidelity, etc., Co. v. State, ex rel.* (1910), 46 Ind. App. 373, 92 N. E. 691; *State, ex rel., v. Dudley* (1910), 45 Ind. App. 674, 91 N. E. 605; §8355 Burns 1908, §5323 R. S. 1881.

Generally speaking, men, if left to their own choice, would rather obey the law than to violate it. From all the evidence produced at the trial of the cause in the court below, we are fully supported in holding that the conditions shown to exist at Patriot on that eventful Fourth of July were not an expression of the true life and character of that community, but that such conditions were rather the result of the unlawful sales of intoxicating liquor, as charged in the complaint, for which appellants must respond in damages to appellee.

The evidence is sufficient to support the verdict, and the judgment is affirmed.

NOTE.—Reported in 98 N. E. 839. See, also, under (2) 23 Cyc. 324, 326; (3) 23 Cyc. 314, 326.

BRADFORD v. McBRIDE ET AL.

[No. 7,876. Filed November 23, 1911. Rehearing denied March 6, 1912. Transfer denied June 6, 1912.]

1. JUDGMENT.—*Judgment on Cross-Complaint. — Cross-Complaint Not Confined to Matters Germane to Original Action.—Validity of Judgment.*—Although a judgment on matters outside of the issues is void, a judgment rendered on a cross-complaint, and which is within the issues tendered by such cross-complaint, is valid even though such issues are not germane to the original action. p. 628.
2. JUDGMENT.—*Modification.—Motion.—Parties.*—A motion to modify a judgment rendered on a cross-complaint, not made until the term following the term of court at which the judgment was rendered, will not lie in the absence of notice to all the parties affected by the judgment. p. 629.
3. APPEAL.—*Review.—Overruling Motion to Modify Judgment.*—The action of the lower court in overruling a motion to modify a judgment, by striking out that portion rendered on a cross-complaint which tendered issues not germane to the main action, will not be reversed, where appellant was not a party to such cross-complaint and consequently not bound by the portion of the judgment sought to be stricken out. p. 629.

From Lake Circuit Court; *Willis C. McMahan*, Judge.

Motion by Henry A. Bradford to modify a judgment rendered in an action brought by Lillie S. Baker against said Henry A. Bradford, Mathew McBride and others. From a judgment overruling the motion, Henry A. Bradford appeals. *Affirmed.*

Adrian L. Courtright, Augustin Boice, Lasley & Lasley, Ansel M. Lasley and Frank A. Lasley, for appellant.

Frank B. Pattee, Frank W. Swett and Mary M. Bartelme, for appellees.

HOTTEL, J.—This is an appeal from a judgment of the lower court on a motion, made by appellant, to modify the judgment in a cause wherein Lillie S. Baker was plaintiff, and appellant, appellees and numerous other parties were defendants.

The suit brought by Mrs. Baker was one to quiet title to lots ten and eleven in block five of an addition to the city of Tolleston, Indiana. Appellees O'Dell and Mathews each filed separate cross-complaints, and appellees Wegg and McBride filed a joint cross-complaint. To each of said cross-complaints plaintiff and defendants to the original complaint, other than appellant, were made defendants, but appellant was not made a party to either of said cross-complaints. Each of said cross-complaints was an action to quiet title to separate and independent lots in said addition to said city, and neither of the lots mentioned or involved in the original action was mentioned therein. On issues formed there was a trial and judgment for the plaintiff upon her complaint and in favor of said cross-complainants on their respective cross-complaints.

This judgment was rendered on May 27, 1909, being the twenty-eighth judicial day of the April term of said court, and quieted the title in and to each lot claimed by the plaintiff and by the respective cross-complainants. On October 9, 1909, being the thirtieth day of the September term of said Lake Circuit Court, said cause was, on motion of appellant, reinstated on the docket, and appellant then appeared specially, and moved that the court modify said judgment so as to eliminate that part of said judgment which quieted title in the respective cross-complainants to the particular lots described in their respective cross-complaints, on the ground that such lots were not described in, or involved in the original complaint, and that the court therefore did not have jurisdiction to render that part of said judgment involving such lots.

Notice of said motion to modify said judgment was served on each of said cross-complainants, November 9, 1909, but, was not served on plaintiff nor any of the defendants to said cross-complaint.

The attorneys for said cross-complainants on September

29, 1910, appeared to said motion, and the court, after hearing the same, overruled said motion and refused to modify said judgment, to which ruling of the court appellant excepted, and from this decision appellant appealed.

The transcript and assignment of errors was filed herein December 24, 1910. Appellant makes each of said cross-complainants appellees to this appeal, they being the only parties on whom he served notice of his motion to modify said judgment. Appellees move to dismiss the appeal; the grounds of which motion are, in substance, as follows: (1) This court has no jurisdiction of the appeal because all of the parties in whose favor the judgment below was rendered and who are affected by the judgment entered in said court, are not made parties to nor named in the assignment of errors. (2) Because said motion was not made until one term after final judgment had been entered and the cause disposed of in the court below, and such court had no jurisdiction to take any action whatever in the case at the time the motion to modify was filed. (3) Because appellant, Henry A. Bradford, is not named as a cross-defendant in any of the cross-complaints on which decrees were taken against which he bases his ground of complaint, and he is not therefore affected or bound thereby.

In his motion to modify said judgment, appellant sets out the facts above indicated as disclosed by the record, and avers that he is the owner of the lots described in the several cross-complaints, title to which was quieted in said respective cross-complainants.

It is contended by appellees that appellant was not a party to either of said cross-complaints on which that part of the judgment which he seeks to strike out was rendered, and was not affected thereby, and is, therefore, in no position to prosecute this appeal.

In answer to this contention appellant insists that said judgment, in so far as it quieted title in the cross-complainants to the respective lots described in their said cross-com-

plaints, was void, and that on account of his being a defendant to the original suit brought by Mrs. Baker a cloud was by such judgment cast on his title to said lots, and that although he was not a party defendant to either of said cross-complaints he was entitled to ask the court to remove said cloud by striking out such parts of such judgment.

There is authority to the effect that one may invoke the jurisdiction of the court in certain instances to obtain relief even from void judgments, but so far as we have been able to find, these cases are all cases where such judgments were in some way being attempted to be enforced or some right or claim was being asserted under such judgment against the party seeking relief therefrom. In view, however, of the conclusion reached in this case, this question is not important.

In support of his contention, that the parts of said judgment which by his motion he sought to strike out were void, appellant asserts that a court has no jurisdiction to adjudicate matters between the litigants outside the issues tendered by the respective pleadings, and that a judgment in so far as it attempts to adjudicate such questions is void. This contention is supported by authority. *Fletcher v. Holmes* (1865), 25 Ind. 458, 473; *Unfried v. Heberer* (1878), 63 Ind. 67, 73; *Barrett v. Cohen* (1889), 119 Ind. 56, 58, 20 N. E. 145, 21 N. E. 322, 12 Am. St. 363; *Reynolds v. Stockton* (1891), 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

In this connection it is further insisted that a cross-complaint must be germane to the cause of action tendered by the complaint, and that a cross-complaint which tenders an issue between the defendants to the complaint, wholly independent of and in noway connected with the cause of action stated in the complaint, should be stricken out and not considered by the court.

This contention of counsel is also supported by authority. *Washburn v. Roberts* (1880), 72 Ind. 213, 217; *Pool v. Davis* (1893), 135 Ind. 323, 330, 34 N. E. 1130; *Heaton v. Lynch*

(1894), 11 Ind. App. 408, 416, 38 N. E. 224; *Buscher v. Volz* (1900), 25 Ind. App. 400, 403, 58 N. E. 269.

None of the authorities cited, however, presents the question presented by the record in this case. The record here discloses that the plaintiff to the original action was made defendant to each of said cross-complaints, that said cross-complaints were filed without objection by any of the parties to the action, and the court without objection adjudicated the issues thereby tendered.

We can see good reason for holding that a judgment rendered on matters outside of the issues tendered by the pleadings is void. So, also, can we see good reason for

1. holding that a cross-complaint should be confined to matters germane to the original action, and that the parties to such action, especially the plaintiff, may insist on the cross-complaint being so limited; but we do not think that it necessarily follows from such holdings that where plaintiff to the original action and all the parties to the cross-complaint allow the filing of such cross-complaint tendering issues not germane to the original action, and then appear to such cross-complaint and file answers thereto and allow judgment to be rendered on such cross-complaint without objection, that such judgment as to such parties is void. A judgment on matters outside of the issues is void because the court has assumed a jurisdiction not invoked by the pleadings of the parties, but no such reason exists for declaring a judgment on a cross-complaint void, which is within the issues of such cross-complaint but on issues not germane to the original action.

The parties to the original action, especially the plaintiff, have the right to insist that the trial of the issue which they tender shall not be delayed by, or confused with, issues tendered by one of the defendants to his action wholly independent of and not germane to the original action, but when all parties acquiesce in the trial of such independent issues,

we do not think it can be said that the judgment rendered thereon is void as to such parties. This conclusion, we think, is in perfect harmony with the cases before cited, and is especially supported by the case of *Fletcher v. Holmes*, *supra*.

But conceding without deciding that under the averments of appellant's motion to modify, and the record on which it is predicated, he had a right to ask the modification of the judgment presented by his motion, it was necessary that the court should determine and adjudicate the question so presented.

The record discloses that this motion was not made until the term following the term of court at which the judgment sought to be modified was rendered. The cause was

2. no longer *in fieri*. Before the jurisdiction of such court, complete as to parties, could be invoked anew in said cause, it should certainly have before it all the parties affected by the judgment sought to be modified, at least all the parties to the cross-complaint on which the part of such judgment sought to be modified was rendered. *Cauthorn v. Bierhaus* (1909), 44 Ind. App. 362, 366, 88 N. E. 314.

The record in this case shows that the respective cross-complainants alone were served with notice of the motion to modify. Neither the plaintiff to the original action, nor any of the several defendants to the cross-complaint were parties to such motion.

The court below, therefore, was without jurisdiction to render a judgment on said motion binding on all the parties to the original judgment.

It is conceded that appellant was not a party to either of the several cross-complaints on which that part of said judgment was rendered, which he, by his motion, sought

3. to strike out. The parts of said judgment based on said cross-complaints could not, therefore, bind him,

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and any title he may have to real estate included therein, can not be seriously clouded or affected thereby.

Judgment affirmed.

NOTE.—Reported in 96 N. E. 508. See, also, under (1) 23 Cyc. 802; (2) 23 Cyc. 877, 878; (3) 3 Cyc. 233.

COMMERCIAL LIFE INSURANCE COMPANY v.
MCGINNIS.

[No. 7,529. Filed March 28, 1912. Rehearing denied June 7, 1912.]

1. **INSURANCE.—Life Insurance.—Complaint.—Exhibit.—Application Referred to in Policy.**—A complaint to recover on a policy of life insurance, where the application is made a part of the policy by reference, is not insufficient for the reason that such application is not made a part of the complaint. p. 631.
2. **INSURANCE.—Life Insurance.—Rebate.—Knowledge of Agent.**—Knowledge on the part of an authorized agent of a life insurance company that he was giving to the insured a rebate on his first premium, is binding notice on the company. p. 632.
3. **INSURANCE.—Life Insurance.—Rebates.—Validity of Policy.**—Where an authorized life insurance agent rebated the insured's first premium and delivered the policy as if the premium had been paid in full, there being at the time no law against rebating, the company cannot take advantage of such rebating to defeat the contract. p. 632.
4. **INSURANCE.—Life Insurance.—Execution of Contract.—Failure to Deny Under Oath.**—In an action on a life policy, the execution of the contract must be taken as admitted, where defendant fails to deny its execution under oath. p. 633.
5. **INSURANCE.—Life Insurance.—Incontestable Clause.**—Where a life policy contained a clause making it incontestable after one year from date of issue, except for certain specific causes, the insurer cannot after the expiration of such time avoid the policy for causes not included within the exception. p. 633.

From Superior Court of Vanderburgh County; *Alexander Gilchrist*, Judge.

Action by Emily S. McGinnis against the Commercial Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

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Robinson & Stilwell, Pickens, Cox & Conder, for appellant.

Morton C. Embree, Harvey Harmon and Lucius C. Embree, for appellee.

MYERS, J.—On January 2, 1908, appellant issued a policy on the life of John R. McGinnis, with Emily S. McGinnis, his wife, as beneficiary, who brought this action to enforce its payment.

A demurrer for want of facts, to the complaint in one paragraph, alleging facts usual in such cases, was overruled, and this ruling is assigned as error.

The insured's application, which is made a part of the policy by reference, is not made a part of the complaint, and for this reason only the pleading is claimed to

1. be defective. Appellant, in support of this contention, insists that the rule of pleading in this State in this respect should no longer be followed. Appellant's argument is persuasive, but we are not convinced that the rule so well settled should be overruled. *Federal Life Ins. Co. v. Kerr* (1910), 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; *Penn Mut. Life Ins. Co. v. Norcross* (1904), 163 Ind. 379, 72 N. E. 132; *Bird v. St. John's Episcopal Church* (1900), 154 Ind. 138, 56 N. E. 129; *Mutual Reserve Life Ins. Co. v. Ross* (1908), 42 Ind. App. 621, 86 N. E. 506.

The overruling of appellant's motion for a new trial is assigned as error. Under this assignment the only questions presented by appellant's brief are, that the verdict is not sustained by sufficient evidence, and that it is contrary to law.

In support of these causes for a new trial, appellant insists that the policy was never in force, for the reason that by its terms it did not go into effect unless the first premium was actually paid during the lifetime and good health of the insured.

There is such a provision in the policy, as claimed by ap-

pellant, but in connection therewith is the further provision, that the premium may be paid to an authorized agent of the company in exchange for a receipt signed by the president or secretary, and countersigned by the agent.

From the condensed recital of the evidence in appellant's brief, it is difficult to determine what the evidence is on this subject, but as we understand it, the record shows

2. that on December 31, 1907, the insured, at the solicitation of N. R. Greene, appellant's authorized agent, made application for the policy sued on, and which was issued on January 2, 1908. The first premium was \$57.52, and at the time the insured made said application said agent delivered to him a receipt for \$57.52, signed by appellant's secretary and "countersigned by N. R. Greene, agent." There is evidence tending to show that the insured paid only \$5 on account of the first premium, and appellant claims that it did not know the full premium was not paid until more than seven months after it issued the policy. Then, August 19, it tendered to the insured the money so paid by him, and demanded a return of the policy which had been unconditionally delivered to him. The tender so made and appellant's demand were refused. Appellant insists that the evidence shows that this is an "aggravated case of rebating", and a fraud on all other policy holders.

At the time the insured made his application and the policy in suit was issued, there was no law against rebating, and from all the evidence bearing on the amount of money paid by the insured on account of the first premium, we are inclined to the opinion that the jury was authorized to infer that if less than the full amount of the first premium was paid, it was with the knowledge and consent of appellant. In any event, under the facts in this case, knowledge of the agent was notice to appellant. *Metropolitan Life Ins. Co.*

v. Willis (1906), 37 Ind. App. 48, 75 N. E. 560. This

3. may be a case of rebating, as claimed, but if so, appellant will not be allowed to take advantage of its own

conduct to defeat a contract in this respect fairly
4. entered into. The execution of the contract sued on must be taken as admitted, by a failure to deny it under oath. §370 Burns 1908, §364 R. S. 1881; *Phoenix Ins. Co. v. Rowe* (1889), 117 Ind. 202, 20 N. E. 122.

In the case of *Penn Mut. Life Ins. Co. v. Norcross, supra*, it is said on page 386: "There being no effectual denial of the fact of delivery, the question arises whether the pleading of a breach in the conditions contained in the application and in the policy prevented the latter from having any inception. It is obvious that, no matter how resolutely a party declares beforehand that he will not be bound except by a contract of a specified character, yet, if he afterwards makes a contract in disregard of his declaration, his prior provision will avail him nothing. * * * The provisions of a formal contractual writing, which a corporation has caused to be signed and placed in the hands of an agent for delivery, may be waived by the act of the agent himself, if he have sufficient power in the premises, or it may be the result of silence upon the part of the officers of the corporation after it had constructive knowledge of its agent's act in delivering the contract, at least where resolute good faith required a timely disaffirmance of his act."

It is further insisted that the evidence shows that the insured procured the policy through false representations as to his health and physical condition, also that the trial court erroneously excluded certain evidence offered by appellant tending to prove that certain representations in the insured's application were false.

The policy by its terms was incontestable after one year from the date of its issue, providing the premiums were duly paid, except for certain specific causes, none of which

5. is relied on to defeat this action. The insured died January 16, 1909. This action was commenced February 8, 1909. Prior to that time appellant made no claim of fraud in the procurement of said insurance. The incon-

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testable clause amounted to something more than a mere matter of form. As said in the case of *Clement v. New York Life Ins. Co.* (1898), 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. 650: "The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy. It has been held that an agreement limiting the time within which an action may be brought upon a policy of insurance by the beneficiary, is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. If this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts."

By the clause in question, appellant took one year for the purpose of investigating and determining whether it would exercise its right to repudiate and rescind its contract, on the ground it is now interposing as a defense. If it had exercised any diligence, and the insured's physical condition was that now claimed by appellant, it might easily have discovered such condition within the time reserved by it for that purpose. If it failed to exercise vigilance in this respect, it must be treated as having waived its right to deny liability on such ground. *Kline v. National Benefit Assn.* (1887), 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; *Court of Honor v. Hutchens* (1909), 43 Ind. App. 321, 82 N. E. 89; *Reagan v. Union Mut. Life Ins. Co.* (1905), 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. 659, 4 Ann. Cas. 362; *Clement v. New York Life Ins. Co.*, *supra*.

Judgment affirmed.

NOTE.—Reported in 97 N. E. 1018. See, also, under (1) 25 Cyc. 917; (2) 25 Cyc. 863; (3) 25 Cyc. 726; (4) 31 Cyc. 532; (5) 25 Cyc. 873. As to the general rule that notice to the agent is notice to the principal. See 24 Am. St. 228.

STEELE v. MICHIGAN BUGGY COMPANY.

[No. 6,991. Filed June 20, 1911. Rehearing denied June 7, 1912.]

1. **APPEAL.—Assignment of Errors.—Rulings on Motion to Strike Out Parts of Deposition.**—Rulings on a motion to strike out parts of a deposition cannot be considered as independent assignments of errors on appeal, but are proper grounds for new trial. p. 637.
2. **EVIDENCE.—Parol Evidence.—Explanatory of Writing.—Admissibility.**—Although parol evidence is not admissible to vary, contradict, add to or take from a written instrument, it is admissible to give effect to the instrument by applying it to the subject-matter and also to show in what sense any equivocal expressions in the writing were used by the parties. p. 638.
3. **APPEAL.—Ruling on Motion.—Motion Not in Writing.—Error Not Available.**—Assignments of errors in overruling a motion for new trial, based on rulings of the trial court on a motion to strike out parts of a deposition, are not available on appeal where such motion to strike out was not in writing. p. 638.
4. **DEPOSITIONS.—Motion to Strike Out.—Statute.**—Section 662 Burns 1908, Acts 1903 p. 338, relative to motions to insert new matter or to strike out parts of pleadings, depositions, etc., is mandatory in its requirements that such motions shall be in writing. p. 638.
5. **PARTNERSHIP.—Evidence.—Admissions.**—In an action where defendants are alleged to be doing business as a copartnership, and each of the defendants has filed an answer in general denial, an admission of either of the alleged partners is competent as against himself. p. 639.
6. **WITNESSES.—Impeachment.—Admissions.**—Where a defendant, testifying as a witness in behalf of his codefendant, denied the existence of an alleged partnership between them, his statements or admissions out of court to the contrary were properly admitted as affecting the weight to be given to his testimony. p. 639.
7. **EVIDENCE.—Admissible for Certain Purpose.—Limiting Effect.**—Where testimony is admissible for certain purposes only, the question of its effect and the purpose for which it should be considered by the jury are matters to be controlled by proper instructions. p. 640.
8. **APPEAL.—Instructions.—Exceptions in Gross.—Motion for New Trial.**—Where instructions are excepted to in gross, or the ground of the motion for new trial alleging error in giving or refusing instructions is in gross, and one of said instructions is sound, the error so relied upon in giving or refusing the same will not be available on appeal. p. 640.

9. **PARTNERSHIP.—Existence of Relation.—Actions.—Estoppel.—Evidence.**—The liability of a person not in fact a partner, but who has held himself out as such, or has permitted himself so to be held out as such, rests on the doctrine of estoppel, and the proof in such case must show all the elements sufficient to constitute the estoppel. p. 640.
10. **ESTOPPEL.—Estoppel In Pais.—Elements.**—To constitute an estoppel *in pais*, there must have been a representation or concealment of material facts made with a knowledge of the facts, and with the intention that the other party should act upon it, and the party to whom the representation was made must have been ignorant of the truth in the matter and must have been induced thereby to act. p. 642.
11. **PARTNERSHIP.—Existence of Relation.—Estoppel.**—In order to create a liability against one sought to be charged as a partner, on the ground that he has held himself out as a partner, the facts which constitute the holding out must have preceded the extension of credit on which recovery is sought and must have induced the giving of such credit. p. 643.
12. **TRIAL.—Liability of One Holding Himself Out as Partner.—Instruction.—Error Not Cured by Correct Instruction.**—Where defendant was sought to be charged as a partner on the ground that he had held himself out as such, an erroneous instruction which undertook to tell the jury what created a liability against him and omitted therefrom a necessary element constituting such liability, was not cured by another instruction correctly stating the law. p. 643.
13. **TRIAL.—Instructions.—Inconsistent or Misleading.**—Where two or more instructions are inconsistent and calculated to mislead the jury, or leave it in doubt as to the law, they are cause for reversal. p. 643.
14. **TRIAL.—Instructions.—Partnership.**—In an action against one charged as a partner, an instruction that “a partnership is a combination by two or more persons of capital, or labor, or skill, or some or all of these, for the purpose of business for their common benefit,” was erroneous in that it omitted the element of co-ownership of the profits of the business, which is the ultimate and conclusive test of a partnership. p. 644.
15. **APPEAL.—Review.—Incomplete Instruction.—Prejudicial Effect.**—Where, in view of the evidence and the issues in the case, appellant may have been prejudiced by an instruction which was incomplete rather than erroneous, it will be cause for reversal, although it might not in every case constitute available error. p. 644.

From St. Joseph Circuit Court; *Walter H. Funk*, Judge.

Steele v. Michigan Buggy Co.—50 Ind. App. 635.

Action by the Michigan Buggy Company against Charles Steele and another. From a judgment for plaintiff, the defendant, Steele, appeals. *Reversed.*

Dudley M. Shively, Charles P. Drummond and Donald P. Drummond, for appellant.

M. L. Howell, V. G. Jones, D. D. Bates and Gilbert A. Elliott, for appellee.

HOTTEL, J.—Action by appellee against appellant and De los Metzger on note and account.

The complaint is in two paragraphs, each of which seeks to charge appellant and said Metzger as partners doing business under the firm name of "The Mishawaka Carriage and Harness Company," the first paragraph being an ordinary suit for a balance due on account for goods and merchandise sold and delivered to said firm in the sum of \$278.76, and the second paragraph being on a note alleged to have been executed by said defendants, and which they failed to pay after protest. Total demand, \$600. There was a separate answer of general denial by each defendant to each paragraph of the complaint, and a sworn answer of *non est factum* to the second paragraph by defendant Steele. On the issues thus formed, there was a trial by jury, and a verdict against both defendants in the sum of \$517, on which judgment was rendered, and defendant Steele prayed an appeal, having first unsuccessfully moved for new trial.

The first and second assignments of errors relate to rulings on a motion to strike out parts of a deposition, and are proper grounds for new trial, but cannot be consid-

1. ered as independent assignments of errors. *National Bank, etc., Co. v. Dunn* (1886), 106 Ind. 110, 6 N. E. 131; *Burnett v. Milnes* (1897), 148 Ind. 230, 235, 236, 46 N. E. 64; *Capital Nat. Bank v. Wilkerson* (1905), 36 Ind. App. 550, 555, 76 N. E. 258.

This leaves as the only error properly assigned and presented, that of the ruling of the court on the motion for

a new trial. The first ground of this motion urged
2. calls in question a ruling on the admission of certain evidence. The question objected to related to a memorandum filed as an exhibit with a deposition, said memorandum being a "statement as a basis of credit made to the Mercantile Agency R. G. Dun & Co. for the use of its creditors," and the question was: "And why is the blank headed D. R. Metzger proprietor, if you know?" The question was objected to on the ground that the paper itself was the best evidence of its contents. The question did not ask for the contents of the memorandum or for any part of the same, and was not subject to the objections urged against it. The question and the evidence sought by the answer thereto were explanatory only, and in view of the questions and answers that had preceded the one objected to, we think the question was a proper one.

While it is settled law "that parol evidence is not admissible to vary, contradict, add to or take from a written instrument," yet it "is equally as firmly established, and strongly sustained by authority and on principle, that parol evidence is admissible to give effect to a written instrument, by applying it to the subject-matter, * * * and where there are equivocal expressions used in a written instrument, parol evidence is admissible to show in what sense they were used by the parties." *Mace v. Jackson* (1871), 38 Ind. 162, 166, 167. See, also, *Evansville, etc., R. Co. v. Shearer* (1858), 10 Ind. 244, 248, 249; *Clark v. Crawfordsville Coffin Co.* (1890), 125 Ind. 277, 280, 25 N. E. 288; *Thomas v. Troxel* (1901), 26 Ind. App. 322, 328, 59 N. E. 683.

The next grounds of the motion for a new trial, being numbers two, three and four of the errors presented
3. by appellant, relate to rulings on motion to strike out parts of a deposition, and are not available be-
4. cause such motion was not in writing. The statute requiring such motion to be in writing is mandatory.

Steele v. Michigan Buggy Co.—50 Ind. App. 635.

§662 Burns 1908, Acts 1903 p. 338; *Crystal Ice Co. v. Morris* (1903), 160 Ind. 651, 653, 67 N. E. 502.

The grounds for a new trial presented by errors six, seven and eight, relied on and urged by appellant, call in question the ruling of the court in the admission of

5. certain evidence over the objections of appellant, and presents in a different form the same question attempted to be presented by the errors last above mentioned. This evidence was by way of deposition, and consisted in statements made by appellant's codefendant, Metzger, to the witness, tending to show the partnership between appellant and said Metzger, the ground of the objection being that "appellant cannot be bound by the statement of Metzger made in his absence," and "that the relation of partners cannot be established by the declaration of an alleged partner."

The questions and the evidence sought to be elicited thereby were not subject to the objections urged against them, because in this case the record discloses that both defendants, Steele and Metzger, had each filed a general denial to each paragraph of the complaint, and were, in fact, each insisting and had each so testified on the witness-stand, that the partnership relation did not exist between them.

Where each of the alleged partners has filed an answer in general denial, as in this case, the admission of either is competent as against himself. *Vannoy v. Klein* (1890), 122 Ind. 416, 23 N. E. 526; *Cook v. Frederick* (1881), 77 Ind. 406; *Bennett v. Holmes* (1869), 32 Ind. 108.

Metzger having testified in the case, in behalf of Steele, that no partnership existed between himself and Steele, his statements or admissions out of court, to the contrary,

6. were proper as affecting the weight to be given to his testimony at the trial. *McAfee v. Montgomery* (1898), 21 Ind. App. 196, 201, 51 N. E. 957; *Moelering v. Smith* (1893), 7 Ind. App. 451, 456, 34 N. E. 675.

The question of the effect of the testimony and the purpose

for which it should be considered by the jury was a
7. matter to be controlled by proper instructions.

The questions next presented by appellant in his brief relate to the giving of certain instructions by the court on its own motion, and at the request of appellee, and the refusal of certain instructions requested by appellant.

It is insisted by appellee that in the grounds for new trial the alleged error in giving these instructions is joint, and that, therefore, no available question is presented as to each individual instruction, unless each is erroneous.

It is well settled that if instructions be excepted to in gross, or if the ground of the motion for new trial alleging error in giving or refusing instructions be in gross,
8. and one of said instructions be sound, the error so relied upon in giving or refusing the same will not be available on appeal. *Ohio, etc., R. Co. v. McCartney* (1890), 121 Ind. 385, 387, 388, 23 N. E. 258; *Sutherlin v. State* (1886), 108 Ind. 389, 392, 9 N. E. 298.

But, in the case at bar, we think both the exceptions saved to the instructions given and refused, and the ground for new trial, on which error is predicated in giving and refusing the same, are specific and definite as to each, and designate and present for the consideration of this court the correctness of each instruction given and refused.

The first instruction objected to by appellant is number four, given by the court of its own motion, and is as follows:

“In this case there are two questions or elements for
9. you to consider in deciding the question whether the defendant Steele is liable to the plaintiff, as claimed by the plaintiff: First, whether or not the partnership actually existed between Mr. Metzger and Mr. Steele. And if you find that such a partnership did exist, and the goods were bought from the plaintiff for the use in the partnership business, and within the scope of the partnership business, then your verdict should be for the plaintiff against the defendants; Second, If you find that no partnership actually

existed between the defendants, then the second element for you to consider is whether or not the defendant Steele so acted, or permitted others to act, as to lead the Michigan Buggy Company to reasonably believe that he was a partner with him in the business; and if you find that he did so act as to reasonably lead the Michigan Buggy Company to believe that he was a partner in the business, even though in fact he was not such a partner, he would still be liable to the plaintiff in this case. In determining whether or not the acts of Steele were such as to reasonably lead to a belief that he was a partner in the business, you have a right to take into consideration every act and statement of Mr. Steele to the Michigan Buggy Company, and every act of Metzger and statement made by him to the Michigan Buggy Company, if said act or statement was made with the knowledge or consent of Mr. Steele, which might reasonably lead to the belief that he was an actual partner in the business."

In considering this instruction, it must be kept in mind that the only question in this case was whether defendant Steele should be held liable as a partner on the note and account sued on. There was no denial, in fact, that the Mishawaka company got the merchandise on which the account was predicated; nor was there any denial by said Metzger that the note sued on in the second paragraph of complaint was executed by him in the name and style of the "Mishawaka Carriage and Harness Company."

This instruction is prefaced with a statement to the jury that there were two questions for it to consider in determining whether defendant Steele was liable to plaintiff, and then correctly tells the jury, first, what will authorize a recovery in case they find that a partnership actually existed between Metzger and Steele. The instruction then attempts to tell the jury what is necessary to make defendant Steele "*liable* to the plaintiff in this case", even though no partnership existed, and it became important and necessary

that the instruction on this branch of the case should be complete, and contain therein every element necessary to constitute such liability. *Indiana Nat. Gas, etc., Co. v. Vau-ble* (1903), 31 Ind. App. 370, 374, 375, 68 N. E. 195; *Voris v. Shotts* (1898), 20 Ind. App. 220, 224, 50 N. E. 484; *Wyman v. Turner* (1896), 14 Ind. App. 118, 123, 42 N. E. 652.

The doctrine of estoppel furnishes the basis on which one person, not in fact a partner of another, may by his own acts or conduct, or by acquiescence in such other person's acts and conduct, bind himself as such partner. Or, in other words, the liability of a person not in fact a partner, but who has held himself out as such, or has permitted himself so to be held out as such, rests on the doctrine of estoppel, "and the proof in such case must show all the elements sufficient to constitute the estoppel." *Breinig v. Sparrow* (1907), 39 Ind. App. 455, 461, 80 N. E. 37; 3 Elliott, Evidence §2558.

"To constitute an estoppel *in pais*, the following elements must appear, viz.: (1) A representation or concealment of material facts; (2) the representation must have been made with a knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the truth of the matter; (4) the representations must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced thereby to act." *Farmers Bank v. Orr* (1900), 25 Ind. App. 71, 84, 55 N. E. 35. See, also, *Roberts v. Abbott* (1891), 127 Ind. 83, 89, 26 N. E. 565; *Kuriger v. Joest* (1899), 22 Ind. App. 633, 637, 52 N. E. 764, 54 N. E. 414.

The instruction above quoted as given in this case entirely leaves out of account the third and fifth elements above quoted as necessary to constitute an estoppel, and yet, with these elements left out, the court tells the jury that defendant Steele "would still be liable to the plaintiff in this case".

The concluding part of the instruction is also open to

objection and criticism, in that it tells the jury that in determining whether the acts of defendant Steele were such as reasonably to lead to the belief that he was a partner, they have a right to take into account every act and statement of Steele to the appellant, and of Metzger as well, if made with the knowledge or consent of Steele, without regard either to the time of making such statement or to its being the inducing cause of the credit given.

The facts and conduct which constitute the holding out of the person sought to be charged as a partner in order to create liability as against such person in favor of

11. the person seeking to charge him with such liability must have preceded the extension of credit on which recovery is sought, and must have induced the giving of such credit. 3 Elliott, Evidence §2558; 9 Ency. Evidence §§549, 550; *Breinig v. Sparrow, supra*.

Appellee insists that appellant was not harmed by the giving of said instruction, because other instructions were given by the court containing said omitted elements

12. of estoppel. This instruction having undertaken to tell the jury what created a liability against appellant in favor of appellee, and omitting therefrom a necessary element constituting such liability, could not be cured by another instruction correctly stating the law. *Indiana Nat. Gas, etc., Co. v. Vauble, supra*; *Chicago, etc., R. Co. v. Glover* (1900), 154 Ind. 584, 587, 57 N. E. 244; *Pittsburgh, etc., R. Co. v. Noftsgar* (1897), 148 Ind. 101, 109, 47 N. E. 332; *Wenning v. Teeple* (1896), 144 Ind. 189, 194, 41 N. E. 600.

If two or more instructions are inconsistent and calculated to mislead the jury, or leave it in doubt as to

13. the law, they are cause for reversal. *Pittsburgh, etc., R. Co. v. Noftsgar, supra*; *Wenning v. Teeple, supra*.

Objection is also made to instruction one and one-half, given at the request of appellee, which is as follows: "A partnership is a combination by two or more persons of capi-

tal, or labor, or skill, or some or all of these, for the
14. purpose of business for their common benefit. While this instruction defines partnership in the language used by one of the authorities on partnership, and occasionally quoted in the decisions of other states, it lacks an element which we think essential under the authorities of this State, and, in fact, under the authorities generally, viz., the *coöwnership of the profits of the business*.

In the case of *Breinig v. Sparrow, supra*, this court said on this subject, at page 461: "The ultimate and conclusive test of a partnership is the coöwnership of the profits of the business. If there is community of profits, a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associate. In other words, a property right in them from the start in one associate as much as in the other." To the same effect are the following cases: *Bradley v. Ely* (1900), 24 Ind. App. 2, 5, 56 N. E. 44, 79 Am. St. 251; *Macy v. Combs* (1860), 15 Ind. 469, 471, 77 Am. Dec. 103; *Ward v. Thompson* (1859), 22 How. 330, 331, 16 L. Ed. 249; *Farmers Ins. Co. v. Ross & Lennan* (1876), 29 Ohio St. 429, 431; *O'Donohue v. Bruce* (1899), 92 Fed. 858, 860, 35 C. C. A. 52; *McMurtrie v. Guiler* (1903), 183 Mass. 451, 67 N. E. 358; *Ryder v. Wilcox* (1869), 103 Mass. 24; *Meehan v. Valentine* (1892), 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835.

We do not think that a business engaged in by two or more persons, who combine their capital, labor or skill for the purposes of a common benefit, is necessarily a partnership within the definition above quoted, and recognized by this court and the Supreme Court.

While this instruction may be said to be incomplete rather than erroneous, and might not in every case constitute available error, yet, in view of the evidence and the issues

15. in this case, we think that it was important that the instruction which attempted to define a partnership should have contained the element of a coöwnership of the

profits of the business, and appellant may have been prejudiced in his defense by its omission.

Objections are urged to other instructions given, but as the case must be reversed and a new trial ordered on account of the error in giving those already discussed, we deem it unnecessary to consider the others.

Judgment reversed, with instructions to the court below to grant a new trial.

NOTE.—Reported in 95 N. E. 435. See, also, under (1) 2 Cyc. 899; (2) 17 Cyc. 662, 728; (3) 29 Cyc. 941; (4) 13 Cyc. 973; 28 Cyc. 6; (5) 30 Cyc. 408; (6) 40 Cyc. 2687; (7) 38 Cyc. 1340; (8) 38 Cyc. 1796; (9) 30 Cyc. 390; (10) 16 Cyc. 722; (11) 30 Cyc. 394; (12) 38 Cyc. 1782; (13) 38 Cyc. 1602, 1604; (14) 38 Cyc. 1686; 30 Cyc. 592; (15) 38 Cyc. 1778. As to the admission of parol evidence to explain, rather than to vary, written instruments, see 122 Am. St. 546; 11 Am. St. 894. As to the admissibility of proof of prior contradictory statements of a witness, see 82 Am. St. 39. For a discussion of the persons as to whom an ostensible partner is estopped to deny the partnership relation, see 10 Ann. Cas. 135.

WALKER, ADMINISTRATOR, v. BEMENT.

[No. 7,904. Filed March 7, 1911. Rehearing denied June 7, 1912.]

1. **APPEAL.**—*Assignment of Errors.*—*Failure to Carry Demurrer to Answer Back to Complaint.*—*Question Presented.*—An assignment of errors in the failure of the trial court to carry back a demurrer to a paragraph of answer and sustain it to the complaint presents the question of the sufficiency of the complaint on appeal. p. 651.
2. **EVIDENCE.**—*Value of Corporate Stock.*—*Prima Facie Evidence.*—The par value of a share of corporate stock is *prima facie* its actual value. p. 651.
3. **MORTGAGES.**—*Security for Loan of Stock.*—*Foreclosure.*—*Complaint.*—*Allegation as to Value of Stock.*—*Par Value.*—*Sufficiency.*—A complaint to foreclose a mortgage conditioned for the return to mortgagee of certain stock loaned to the mortgagor or the payment to mortgagee of its par value, which alleged a failure to return the stock and averred the par value of such stock, was sufficient as against a demurrer for failure to allege the market value thereof, since, in the absence of an averment to the contrary, the statement of its par value amounted to an averment that it was actually worth its face. p. 651.

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4. **PLEADING.—Answer.—Demurrer.**—It is not error to sustain a demurrer to a paragraph of answer when the matter pleaded therein may be proved under the general denial. p. 652.
5. **APPEAL.—Briefs.—Matters Not Argued.**—Where, under the head of "Points and Authorities" in appellant's brief, the propositions of law stated and the authorities cited in support of appellant's contention that the trial court erred in sustaining a demurrer to certain paragraphs of answer are of little aid to the court in determining the question, and the matters arising on such demurrer are not argued, the court will not pass on the sufficiency of such paragraphs of answer. p. 652.
6. **MORTGAGES.—Security for Loan of Stock.—Construction.—Satisfaction.**—A mortgage executed to secure the return of certain stock loaned to the mortgagor and conditioned for the payment to mortgagee of its par value in case of failure to return such stock, but which fixed no time for its return, made the stock returnable on demand, so that on the failure or refusal of the mortgagor to return the stock on demand, or within a reasonable time thereafter, the rights of the parties became fixed and the mortgagor could not thereafter insist on a discharge of the mortgage by a return of the stock. p. 652.
7. **BAILMENT.—Loan of Stock.—Obligation of Borrower.**—The mere loan of stock gives rise to no obligation on the part of the borrower except that of returning it on demand, and the right of the lender to demand money for the stock can not arise until there has been a failure to return on demand, and arises only out of the breach of such obligation. p. 655.
8. **MORTGAGES.—Security for Loan of Stock.—Construction.—Liability Secured.**—Where a mortgage recited that the mortgagee had previously loaned the mortgagor corporate stock of a certain par value and that the mortgagor had pledged said stock to secure certain of his debts, and contained the provision that it was to secure to the mortgagee the return of said stock, or the payment to her of its par value, and to indemnify her against loss on account of having loaned such stock to mortgagor and his subsequent pledge thereof, such mortgage fixed a lien on the land described for the payment to mortgagee of actual damages up to the amount of the par value of such stock in the event of failure to return. pp. 655, 656.
9. **MORTGAGES.—Construction.—Intention of Parties.**—In the construction of a mortgage, the intention of the parties as gathered from the language of the instrument, considered in the light of the settled rules of law relating to the construction of such contracts, governs. p. 656.
10. **MORTGAGES.—Security for Loan of Stock.—Construction.—Liability of Mortgagor.**—Although the lien of a mortgage executed to

secure the return to mortgagee of certain stock loaned to mortgagor, or the payment of its par value in the event of failure to return, is limited to the amount of the par value of such stock, the borrower, on failure to return the stock, becomes personally liable for its value even though that value is in excess of the par value. p. 657.

11. **CONTRACTS.—Penalties.—How Regarded in Equity.**—A court of equity regards a penalty in a contract as intended only to secure its fulfillment, and not as a source of profit or advantage in the event of a default, so that where a breach admits of compensation the injured party will be compelled to accept what is just and will not be permitted to make use of the letter of his contract to obtain more. p. 657.
12. **DAMAGES.—Liquidated Damages.—Penalty.—Distinction.**—When the damages likely to be occasioned by the breach of a contract are uncertain, and the sum fixed to be recovered on such breach is not grossly excessive or unjust, it will be treated as liquidated damages; but if the damages likely to be occasioned are susceptible of certain proof, and the amount stipulated to be paid on the breach is in excess of that amount, it will be treated as a penalty. p. 658.
13. **BAILMENT.—Loan of Stock.—Failure to Return.—Damages.—Measure.**—Where corporate stock is loaned to another under an agreement to be returned to the owner on demand, the damages resulting from a failure to return such stock would be its market value at the time of the demand, or, in the absence of a market value, its actual value, unless a higher value could be shown between the date of demand and the time of trial, in which event the higher value would be the measure of damages. p. 658.
14. **ESTOPPEL.—Equitable Estoppel.—Equitable Election.—Position in Judicial Proceedings.**—Where, after executing a mortgage to secure the return of certain stock of the par value of \$19,300 loaned to him by the mortgagee, the mortgagor became a bankrupt, and, being unable to return the stock, listed the real estate described in the mortgage in his schedules in the bankruptcy proceeding as subject to a mortgage of \$19,300, and listed the claim of the mortgagee as a secured claim for the sum of \$19,300, the principles of an equitable election do not apply and, in an action subsequently brought by the mortgagee for foreclosure, the position assumed by him in the bankruptcy proceedings does not preclude those claiming under him from showing the actual value of such stock. p. 659.
15. **ESTOPPEL.—Equitable Estoppel.—Equitable Election.**—Equitable election is the obligation imposed upon a party to choose between two inconsistent or alternative rights where there is a clear intention that he should not enjoy both. p. 659.

Walker v. Bement—50 Ind. App. 645.

From Vanderburgh Circuit Court; *W. M. Wheeler*, Special Judge.

Action by Mary V. Bement against W. Henry Walker, as administrator of the estate of George W. Bement, deceased, and others. From a judgment for plaintiff, the defendant Walker appeals. *Reversed.*

Fred M. Hostetter and *William D. Hardy*, for appellant.
George A. Cunningham and *Daniel H. Ortmeyer*, for appellee.

LAIRY, J.—This was an action brought by appellee, Mary V. Bement, in the court below against appellant, administrator of the estate of George W. Bement, deceased, and Mertina W. Bement, his widow, Mary C. Bement, his mother, they being his only heirs, and Peoples Savings Bank of Evansville, Indiana, for the foreclosure of two mortgages.

The complaint was in two paragraphs. There is no question made as to the first paragraph of complaint or the mortgage on which it is based. All of the questions presented by this appeal arise out of the second paragraph of complaint, and the construction of the mortgage described and set out as an exhibit to this paragraph. This mortgage, permitting the description of the real estate, and the acknowledgment, is in the words and figures following:

“Whereas, on the 26th day of November, 1902, Mary V. Bement loaned to George W. Bement, Jr., one hundred and ninety three shares (193) of the capital stock of the Bement-Seitz Company, of the par value of One Hundred Dollars (\$100.00) per share, amounting in the aggregate to Nineteen Thousand Three Hundred Dollars (\$19,300) par value; and

“Whereas, the said George W. Bement, Jr., afterwards pledged said shares of stock to Gansevoort Bank, N. Y., for the payment of certain debts of the Ohio Valley Produce Company, and said stock now remains in pledge for the amount of said debts;

“Now, therefore, this indenture witnesseth, that said George W. Bement, Jr., unmarried, mortgages and

warrants to the said Mary V. Bement, the following described real estate, situate in the County of Vanderburgh, and the State of Indiana, to-wit: * * *

“To secure to the said Mary V. Bement the return of said stock or the payment to her of its par value, and to indemnify her against loss on account of her having loaned said stock to George W. Bement, Jr., and the pledge afterwards made of said stock as above recited.

“In Witness Whereof, the said George W. Bement Jr., has hereunto set his hand and seal this 21st day of August, 1903.

George W. Bement, Jr.”

The second paragraph of the complaint, which seeks the foreclosure of the mortgage heretofore set out, avers, in substance, that, prior to November 26, 1902, plaintiff was the owner of 193 shares in the Bement-Seitz Company of the aggregate value of \$19,300; that at about said date, plaintiff loaned and transferred said stock to George W. Bement at his request; and that he, in consideration thereof, agreed to return to plaintiff either the stock in specie or its par value; that shortly after appellee loaned said stock to George W. Bement he pledged the same to the Gansevoort Bank of New York, to secure an indebtedness of about \$25,000; that afterward, on August 21, 1903, in consideration of said loan and transfer, and to secure to plaintiff either the return of said stock or the payment to her of the par value thereof, said George W. Bement executed and delivered to her the mortgage heretofore set out; that afterward the Gansevoort Bank caused said stock to be sold for the payment of the debt for which it was pledged, and bid it in for \$15,000, and that thereupon said bank became the owner of said stock, and is still the owner thereof; that said George W. Bement wholly failed to return said stock to plaintiff, or to pay to her the par value thereof, or any part thereof, and that there is now due plaintiff on account thereof \$19,300, together with interest; that on December 2, 1904, said George W. Bement was adjudged a bankrupt: that the value of his

real estate, as fixed by the schedule filed in such proceeding, was \$7,500; that plaintiff's said indebtedness was scheduled as a secured claim in the sum of \$19,300, and, in addition thereto, there was also scheduled a prior mortgage to the Peoples Savings Bank of Evansville, Indiana, in the sum of \$6,000, the latter mortgage being the one on which the first paragraph of complaint is based; that in the course of said bankruptcy proceedings, an order for the sale of said real estate was made, subject to both of said mortgages, and said sale was so made and confirmed; that said real estate was purchased at said sale by Philip W. Frey, who conveyed it to George W. Bement; that said George W. Bement was granted his discharge in bankruptcy on March 22, 1905; that on June 22, 1907, George W. Bement platted said land into lots, and laid out an addition, known as Oakhurst Place, and afterward entered into an agreement with plaintiff by which plaintiff consented that he might sell lots in said addition, on the condition that the proceeds of such sale should be applied first to the payment of the mortgage held by this plaintiff; that said George W. Bement did sell certain lots in said addition, and that plaintiff, through her attorney in fact, did release the mortgage as to the lots so sold; that after the sale of said stock by the bank, as aforesaid, George W. Bement did not have at any time 193 shares of stock in the Bement-Seitz Company, and that he was unable at all times to return said stock or any part thereof; that plaintiff repeatedly demanded the return of said stock; that said George W. Bement married defendant Mertina Bement on March 24, 1906, and that prior to that date, he had been at all times an unmarried man; that he died on January 29, 1908, intestate, leaving defendant Mertina Bement, his wife, and defendant Mary C. Bement, his mother, as his sole heirs at law; that on January 31, 1908, defendant W. Henry Walker was appointed administrator of his estate, and is now acting as such.

The complaint contains other averments, which are not

necessary to be considered in the decision of the questions presented on this appeal.

No demurrer was filed to the second paragraph of complaint, but a demurrer for want of facts was sustained to each of the paragraphs of affirmative answer filed by

1. appellant to this paragraph of complaint. One of the assignments of error relied on is that the trial court erred in failing to carry back the demurrer filed to the second paragraph of answer and sustain it to the second paragraph of complaint. This presents the question to this court as to whether the second paragraph of complaint states facts sufficient to constitute a cause of action. *McIntosh v. Zaring* (1898), 150 Ind. 301, 49 N. E. 164; *Hall v. Brownlee* (1902), 28 Ind. App. 178, 62 N. E. 457.

The only objection seriously urged against the complaint is that it does not contain any averment that the stock described in the mortgage had any market value and that the actual value of said stock is not stated. It is claimed by appellant that, under a proper construction of the mortgage, only the actual value of such stock could be recovered; and that the complaint is insufficient for want of an averment showing the market value of such stock at the time it should have been returned, or, in the event it had no market value, showing its actual value at such time. The par value of a

share of stock in a corporation is *prima facie* its
2. actual value. *Harris's Appeal* (1888), 12 Atl. (Pa.) 743; *Brinkerhoff-Harris, etc., Sav. Co. v. Home Lumber Co.* (1893), 118 Mo. 447, 24 S. W. 129; *Moffitt v. Hereford* (1896), 132 Mo. 513, 34 S. W. 262. The complaint con-

tains an averment of the par value of the stock, and

3. this, in the absence of any allegation to the contrary, amounts to an averment that the stock was actually worth its face, and is sufficient as against a demurrer. The complaint must be held sufficient.

This brings us to a consideration of the several paragraphs of affirmative answer filed by appellant.

The second paragraph of answer avers that plaintiff has suffered no loss or damage whatever by reason of the failure of defendant's decedent to return the stock referred

4. to in the complaint. This paragraph does not aver in direct terms that this stock was of no value; but, even though it should be held to mean that the stock in question never had any value, there was no error in sustaining the demurrer addressed thereto, for the reason that such fact could have been proved under the general denial.

We decline to discuss the sufficiency of the third and fourth paragraphs of answer. The questions arising on the demurrer to these paragraphs of answer are not ar-

5. gued by appellant in his brief. Under the head of "Points and Authorities" the statement is made, under separate headings, that the court erred in sustaining a demurrer to each of these paragraphs of answer, but the propositions of law stated and the authorities cited under these heads are of little aid to the court in determining the question involved in the ruling of the court on the demurrers to these paragraphs of answer. Besides, this case must be reversed for other reasons, and as the pleadings will probably be reformed before another trial, the questions presented by these paragraphs of answer may not again arise.

The questions which are decisive of this appeal arise on the ruling of the trial court in sustaining the demurrers to the fifth and sixth paragraphs of appellant's answer.

The fifth paragraph alleges, in substance, that after the commencement of this suit, and before the filing of this

paragraph of answer, the administrator of the estate

6. of George W. Bement procured from the Gansevoort Bank 193 shares of the capital stock of the Bement-Seitz Company for the purpose of tender, and that stock certificate number 34, for 193 shares of stock issued by said company, a copy of which is set out in the pleading, was duly assigned and delivered to said administrator by said

bank. This paragraph further avers that said administrator was unable to tender said stock either to the plaintiff or to her attorney of record, for the reason that they were both outside of the United States; that one Sebastian Henrich was and had been continuously since April 15, 1901, duly authorized by plaintiff, in writing, to collect and receipt for any money due plaintiff, and to cancel and satisfy any mortgage or mortgages given plaintiff, and to do and perform all and every act and thing requisite in and about the premises as fully to all intents and purposes as the plaintiff might and could do if personally present. The answer sets out a copy of the writing as a part of the pleading, and then avers that on August 12, 1909, defendant administrator unconditionally tendered to said Henrich, as attorney in fact of said plaintiff and for her use and benefit, the certificate of stock, together with \$10 in legal tender money to reimburse her for costs incurred; that said Henrich refused said tender, and that said administrator, on September 6, 1909, placed said stock in the custody of the trial court, together with the \$10 previously tendered, and offered to confess judgment for such further amount, by way of costs and attorneys' fees, as, in the judgment of the court, plaintiff might be entitled to receive.

The complaint avers that, before the death of George W. Bement, plaintiff repeatedly demanded of him the return of the stock mentioned in the mortgage sued on, and that he wholly failed to deliver it to plaintiff. This paragraph of answer does not deny the demand and refusal to deliver the stock as alleged in the complaint, and no facts are averred therein showing any legal excuse for such failure to deliver said stock on demand. The mortgage in suit fixes no time for the return of the stock, and therefore it was returnable on demand. On the demand of the stock, and the refusal or failure to deliver it, the rights of the parties became fixed. If the mortgagor failed to return the stock on demand, or within a reasonable time thereafter, he

lost his right to discharge said mortgage by a return of the stock. *Chapin v. Jacobs* (1862), 10 Mich. 405; *Texas, etc., R. Co. v. Marlor* (1887), 123 U. S. 687, 8 Sup. Ct. 311, 31 L. Ed. 303; *M'Nitt v. Clark* (1811), 7 Johns. (N. Y.) *465. A serious injustice might be done appellee by requiring her to accept the stock in discharge of the mortgage at a time long subsequent to the demand, for the reason that, so far as appears from this paragraph of answer, the stock may have been worth its face at the time of demand, but may have so depreciated between the time of demand and the time of tender as to be entirely valueless.

The sixth paragraph of answer is a partial answer to the second paragraph of complaint, and purports to answer so much of said paragraph of complaint as seeks a foreclosure of the mortgage described therein for any amount in excess of the debt existing by reason of the loan by the mortgagee to the mortgagor of said 193 shares of stock in the Bement-Seitz Company. This paragraph avers, in substance, that said stock, at the time it was loaned, and ever since that time, possessed no market value, and its actual value at the time it was loaned and ever since had not exceeded \$1,930. That there was at no time any consideration for said mortgage in excess of the actual value of the stock loaned.

In deciding the sufficiency of this paragraph of answer, it is necessary to place a construction on the mortgage sued on. The mortgage recites that the mortgagee had previously loaned the mortgagor 193 shares of stock in the Bement-Seitz Company of the par value of \$19,300, and that the mortgagor had pledged said stock to a bank to secure certain of his debts. After the granting part of the mortgage, the condition follows in these words: "To secure to the said Mary V. Bement the return of said stock or the payment to her of its par value, and to indemnify her against loss on account of her having loaned said stock to George W. Bement, Jr., and the pledge afterward made of said stock as above recited." The question is, Does this

mortgage fix a lien on the real estate described for \$19,300, the par value of the stock, in the event it is not returned; or is the amount of the lien in such case limited to such an amount as will indemnify her for any loss she may have sustained by reason of the failure of the mortgagor to return the stock?

The mere loan of the stock gave rise to no obligation on the part of the borrower except that of returning it on demand. It was not a sale, either absolute or condi-

7. tional, and created no obligation on the part of the borrower to pay any sum of money at any time for the stock. The right of the lender to demand money for the stock could not arise until there had been a failure to return it on demand, and this right would not then arise out of an obligation created by the loan, but would arise out of the breach of such obligation.

There is nothing in the mortgage to indicate that there had been a breach of the obligation to return the stock prior to the execution of the mortgage which had given rise

8. to any obligation on the part of the mortgagor to pay any sum of money. It is quite clear, then, that the mortgage was not intended to secure the payment of \$19,300, the par value of the stock, as an obligation, existing at that time, for no such obligation then existed. Under the conditions recited in the mortgage, there could be no consideration for fixing a lien on the land of the mortgagor which could be discharged only by the payment of the par value of this stock. We therefore conclude that the primary purpose of the execution of the mortgage was to secure the return of the stock borrowed. This was the only obligation which existed at the time and was the only consideration on which the mortgage could rest.

This, however, was not the sole purpose of the mortgage, for, after stating that it is made to secure the return of the stock, it proceeds, "or the payment to her of its par value". Why were these words used, and what effect do they have

on the construction of the mortgage? It is evident that the parties contemplated that the mortgagor might fail to perform the obligation to return the stock, and might become liable for a breach of such obligation, and the purpose of these words is to provide that any damages which might arise and accrue to the mortgagee in the future by reason of the failure of the mortgagor to return the stock should be covered and secured by the lien of the mortgage. The question then remains to be considered, whether these words were intended to fix the par value of the stock as the amount which should be recovered in such event as stipulated damages, or whether they were intended to fix a penalty in an amount probably sufficient to cover any actual damages which might accrue in the event the mortgagor failed to

return the stock? The intention of the parties is to

9. govern, and this is to be gathered from the language of the instrument, considered in the light of the settled rules of law relating to the construction of such

8. contracts. To the mind of the court, the language used clearly indicates that it was the purpose of the parties to fix a lien on the land described for the par value of this stock, for the purpose of securing to the mortgagee the payment of any actual damages, up to that amount, occasioned by any failure of the mortgagor to return the stock on demand. Immediately after the words "or the payment to her of its par value," follows this language, "and to indemnify her against loss on account of her having loaned said stock to George W. Bement, Jr., and the pledge afterward made of said stock as above recited". This language clearly indicates that it was the intention only to indemnify her against any loss she might sustain by reason of the failure of the mortgagor to return the stock on demand. The only loss she could sustain in such an event would be the highest value of such stock between the time of the demand and the time of trial, and the payment to her of such value would fully indemnify her.

It is urged in argument that the par value of the stock was fixed by the mortgage as the limit of the mortgagee's recovery, and that this limitation constituted a sufficient consideration for an agreement by the mortgagor to pay that amount. This argument is based on the erroneous assumption that the provision of the mortgage referred to does have the effect to limit the personal liability of the mortgagor to the par value of the stock in the event he should fail to return it on demand. The mortgage had no such effect. It does not contain any personal covenant on behalf of either of the parties to it, and therefore does not create any personal liability as to either party, and it cannot be construed so as to limit the obligation originally created by the loan of the stock or the personal liability that might arise after its execution on account of the failure of the mortgagor to return the stock. On failure to return the stock, the borrower would become personally liable for its value, even though that value was two or three times its par value, and this personal liability could be enforced, and was not in any way limited by the mortgage; but this liability could not be enforced against the land under the lien of the mortgage for more than the par value of the stock, for the lien created by the mortgage is limited to that amount. The same principle applies as in the case of a penal bond given to secure the proper accounting and payment of money. In such a case, the principal is personally liable for all money not accounted for, even though it may many times exceed the penalty of the bond; but in a suit on the bond against the principal and his sureties, the recovery is limited to the penalty named in the bond.

A court of equity regards a penalty as intended to secure the fulfilment of the contract, and not to enable one party to profit by the default of another, or to obtain an advantage that was no part of the original design. When, therefore, a breach admits of compensation, such a

tribunal will compel the injured party to accept a just compensation, and will not permit him to make use of the letter of his contract to obtain more. It is not always easy

to distinguish between a penalty and liquidated damages, but it has been generally held by the courts that when the damages likely to be occasioned by the breach are uncertain, and the sum fixed to be recovered on such breach is not grossly excessive or unjust, it will be treated as liquidated damages, but if the damages likely to be occasioned by the breach are susceptible of certain proof, and the amount stipulated to be paid on such breach is in excess of that amount, it will be treated as a penalty. *Kemble v. Farren* (1829), 6 Bing. 141; *Carpenter v. Lockhart* (1849), 1 Ind. *434; *Merica v. Buget* (1905), 36 Ind. App. 453, 75 N. E. 1083.

In this case the damages which would result from a failure to return the stock on demand would be its market value at the time of the demand, if it had a market value, 13. if not, then its actual value, unless a higher value could be shown between the date of demand and the time of trial, in which event the higher value would be the measure of damages. The damage is certain and susceptible of easy proof. It has been held that damages for the non-fulfilment of a contract of sale are certain within the meaning of the principle here announced. *Jemmison v. Gray* (1870), 29 Iowa 537; *Lee, Wyly & Co. v. Overstreet's Admr.* (1869), 44 Ga. 507.

The facts in the case of *Baird v. Tolliver* (1845), 25 Tenn. 187, 44 Am. Dec. 298, are very similar to those in this case. The court was called on to construe an instrument in writing reading as follows: "Received of Selden Baird four five per cent state bonds which we promise to return to him in twelve months or pay him \$4,000 in current Tennessee bank notes. 25th Jan., 1842." It appeared that the market value of the bonds at the date of the covenant and during the intermediate period was from \$600 to \$800. The \$4,000 was

held to be a penalty. The trial court should have overruled the demurrer to the sixth paragraph of answer, and the judgment will have to be reversed for error in sustaining the demurrer to this paragraph.

It is finally insisted that by the conduct of George W. Bement in the bankruptcy proceeding, as averred in the complaint, he assumed a position in reference to the 14. mortgage in suit, which is inconsistent with the position contended for in this case by his administrator. It is claimed that, by listing the real estate described in the mortgage in his schedules filed in bankruptcy proceedings as subject to a mortgage of \$19,300, and by listing the claim of Mary V. Bement in his schedule of debts filed in that proceeding as a secured claim for the sum of \$19,300, George W. Bement elected to treat the debt secured by the mortgage as a \$19,300 debt and that such an election is binding on him and those claiming under him. The principles of equitable election find no application to the facts in this case.

15. Equitable election is defined to be, "the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both." 2 Story, Eq. Jur. §1075. No case has been cited where this doctrine has been held to apply to a case like this, and we do not know of any equitable principle that would require its application in such a case. Whatever effect the conduct of George W. Bement in the bankruptcy proceeding may have had on his unsecured creditors, it most certainly did not injuriously affect appellee, or place her in any worse position. She knew all of the facts, and could have been in no way misled, and she is in no position to complain.

The judgment of the Vanderburgh Circuit Court is reversed, with directions to overrule the demurrer to the sixth paragraph of answer, and for further proceedings.

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NOTE.—Reported in 94 N. E. 339. See, also, under (1) 2 Cyc. 989; (3) 27 Cyc. 1591; (4) 31 Cyc. 358; (5) 3 Cyc. 388; (6) 27 Cyc. 1521; (7) 5 Cyc. 191; (8) 27 Cyc. 1066; (9) 27 Cyc. 1133; (10) 27 Cyc. 1066; (11) 13 Cyc. 95; (12) 13 Cyc. 95, 97; (13) 13 Cyc. 169; (14) 16 Cyc. 796; (15) 16 Cyc. 785; 15 Cyc. 1086. As to the necessity of demand upon bailee to entitle bailor to enforce return of deposit, see 57 Am. Rep. 97. As to the recitals in a mortgage as evidence of what was intended to be secured, see 112 Am. St. 793. For a discussion of a stipulated forfeiture for the breach of a contract as a penalty or liquidated damages, see 1 Ann. Cas. 244; 10 Ann. Cas. 225; Ann. Cas. 1912C, 1021.

HENRY, RECEIVER, v. EPSTEIN.

[No. 7,238. Filed May 23, 1911. Rehearing denied June 7, 1912.]

1. **APPEAL.**—*Review.*—*Verdict.*—*Evidence.*—In order that a verdict may be upheld, it must appear that every material allegation of the complaint, put in issue by the pleadings, is supported by the evidence in the record, unless the fact so in issue is one of which the trial court could take judicial notice. p. 664.
2. **TRIAL.**—*Issues.*—*Evidence.*—Where a material fact averred in a complaint is not traversed by defendant, such fact is not in issue and need not be proved. p. 664.
3. **RECEIVERS.**—*Actions Against.*—*Complaint.*—*General Denial.*—*Proof Required of Plaintiff.*—*Appointment and Authority of Receiver.*—Under §371 Burns 1908, §365 R. S. 1881, providing that the character and capacity in which a party is sued, and the authority by virtue of which the plaintiff sues, shall require no proof at the trial unless such character, capacity, or authority, be denied by a pleading under oath or by an affidavit filed therewith, plaintiff in an action for personal injuries against the receiver of a railroad, was not required to prove the allegations of the complaint that the railroad was at the time of the injury in the hands of defendant as receiver and that plaintiff had obtained permission to bring the action from the court appointing such receiver, where the only answer filed by defendant was the general denial. p. 664.
4. **RECEIVERS.**—*Railroads.*—*Negligence.*—*Complaint.*—*Material Allegations.*—*Control and Management of Operation.*—In an action against the receiver of a railroad for personal injuries, the averment that the operation of the road and the car which caused the injury was at the time under the control and management of the receiver and his servants is a material fact essential to recovery and is put in issue by the general denial. p. 665.
5. **TRIAL.**—*Findings by Jury.*—A jury is justified in finding a fact to be true where such fact is admitted, where the court takes

judicial notice thereof, where the evidence directly proves it, or where it may be rightly and reasonably inferred from other facts which are either admitted, proved by the evidence, or taken notice of judicially. p. 665.

6. **RECEIVERS.—Appointment.—Title or Ownership of Property.**—The appointment of a receiver for a corporation does not affect the title or ownership of the property, but merely takes the custody, control and management thereof out of the hands of the directors and officers of the corporation and places the property in the custody and under the control of the receiver, to be managed by him under the orders of the court. p. 666.
7. **RECEIVERS.—Railroads.—Negligence.—Control and Management of Operation.—Evidence.—Sufficiency.**—In an action against the receiver of a railroad for personal injuries, where the fact that the railroad company was in the hands of a receiver and of the appointment of defendant as such receiver were admitted, and the evidence showed that the car which caused the injury was one of said company's cars running on its tracks, the jury was warranted in inferring that the car was being operated under the control and management of the receiver, his agents and servants. p. 666.
8. **RAILROADS.—Interurban.—Negligence.—Contributory Negligence.—Evidence.—Sufficiency.**—In an action for personal injuries in being run down by an interurban car, where the evidence showed that the company maintained a double track in the street which passed under a railroad track maintained on a viaduct supported by walls on each side thereof, that owing to the construction of the tracks and road a person using a vehicle could not drive through the viaduct without entering on the tracks, that plaintiff was traveling west and the car which caused the injury was also going west, that on entering the subway plaintiff was on the track used by eastbound cars and on seeing an eastbound car he turned upon the other track and was struck by the westbound car which was traveling at a high rate of speed, that before entering the viaduct plaintiff looked back at a point about six hundred feet east thereof and saw no car approaching from the west, and that a train of cars was crossing over the viaduct which made such noise that might have prevented him from hearing the approach of the car, the evidence warranted the jury in finding the defendant negligent in the operation of its cars at a dangerous rate of speed and that plaintiff was free from contributory negligence. pp. 666, 667.
9. **RAILROADS. — Interurban. — Operation. — Speed. — Travelers on Highway.—Duty.**—Persons in charge of electric cars approaching a point where the existing conditions render the operation of cars dangerous to travelers on the highway are charged with the

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duty of regulating the speed of the cars as not to expose persons using the highway to unnecessary danger, and to use such care and caution as is required by the known danger to which other travelers on the highway are exposed. p. 667.

10. **NEGLIGENCE.—Contributory Negligence.—Question for Jury.—**

Where the evidence on the question of contributory negligence is of such character that a man of ordinary intelligence and honesty might draw an inference of negligence, and another of equal intelligence and honesty might draw the opposite inference, the question is one of fact for the jury and its finding will not be disturbed on appeal. p. 668.

11. **RAILROADS.—Interurban.—Injury to Travelers.—Duty of Traveler.—Looking and Listening.—**

The rule in respect to looking and listening which applies to travelers on highways when approaching the crossing of a steam railway, does not apply in all its strictness to one traveling along a highway where the tracks of an interurban railroad are laid longitudinally in the highway. p. 668.

12. **TRIAL.—Instructions.—Request.—Rights of Parties.—**

A party has a right to have the jury instructed definitely and specifically as to the law applicable to the facts which the evidence tends to prove, if such instructions are properly and seasonably requested and are within the issues; and, where evidence is offered by a party tending to prove a state of facts within the issues, he is entitled to an instruction submitting such hypothetical state of facts to the jury advising it as to the law applicable thereto, provided they find such facts to be established by the evidence. p. 669.

13. **TRIAL.—Instructions.—Applicability to Evidence.—**

In an action for injuries resulting from a collision with an interurban car, the instructions defining the care required of plaintiff and the precautions which he was required to use before driving on the tracks of the defendant, though worded so as to be applicable to any person under like conditions and circumstances, were not objectionable, where the facts and circumstances referred to in the instructions were so applicable to the state of facts claimed to have been shown by the evidence that the jury could not have failed to make the proper application of the law to the facts which the evidence tended to prove. p. 670.

From Marion Circuit Court (75,465); *Vinson Carter*, Judge.

Action by Harmon Epstein against Charles L. Henry, as receiver of the Indianapolis & Cincinnati Traction Company.

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From a judgment for plaintiff, the defendant appeals.
Affirmed.

Elam & Fesler and *Claude Cambern*, for appellant.

Meyers & Ogden and *Merrill Moores*, for appellee.

LAIRY, P. J.—This was an action brought by appellee to recover for personal injuries and for injuries to his property, caused by the collision of a car, operated by appellant, with a wagon in which appellee was riding. The horses attached to said wagon were killed, and other personal property belonging to appellee was damaged, and appellee was personally injured. Two actions were brought by appellee in the court below, one for injuries to his person and one for injuries to his property. By order of the court these cases were consolidated and tried together, resulting in a verdict in favor of appellee in the sum of \$1,000. Over appellant's motion for a new trial, the court rendered judgment on the verdict.

The only error relied on for reversal is that the court erred in overruling the motion of appellant for a new trial. Three causes are assigned in appellant's motion, as follows: (1) That the verdict is not sustained by sufficient evidence; (2) that the verdict is contrary to law; (3) that the court erred in giving and refusing to give certain instructions.

It is alleged in the complaint, that when the accident complained of occurred, the Indianapolis and Cincinnati Traction Company, on whose tracks appellee was injured, was in the possession of and being operated by appellant, as receiver, but there is no direct evidence to prove this allegation; neither was there evidence introduced to prove the further allegation that appellant was appointed receiver for the Indianapolis and Cincinnati Traction Company, and that before bringing this suit appellee received permission from the court appointing such receiver to bring the action. It is contended by appellant that these were all material

facts in issue in the case, proof of which was necessary to sustain the verdict; and that a total want of evidence as to any one or more of such facts is fatal.

In order that the verdict in this case may be upheld, it must appear that every material allegation of the complaint,

put in issue by the pleadings, is supported by the

1. evidence in the record, unless the fact so in issue is one of which the court trying the case could take judicial notice. If any material fact averred in the

2. complaint was not traversed by the defendant, such fact cannot be said to have been in issue, and it was not incumbent on plaintiff to offer evidence in support of such uncontroverted fact.

Section 371 Burns 1908, §365 R. S. 1881, provides:

“Pleadings denying the jurisdiction of the court, or in abatement of the action, and all dilatory pleadings, must

3. be supported by affidavit. The character or capacity in which a party sues or is sued, and the authority by virtue of which he sues, shall require no proof on the trial of the cause, unless such character, capacity, or authority, be denied by a pleading under oath, or by an affidavit filed therewith. An answer in abatement must precede, and can not be pleaded with an answer in bar, and the issue thereon must be tried first and separately.”

Appellee was sued in the capacity of receiver of the Indianapolis and Cincinnati Traction Company. The only answer filed by him was a general denial, in which he designated himself as receiver of the Indianapolis and Cincinnati Traction Company. He filed no answer under oath denying that he was such receiver, or that he occupied the capacity in which he was sued, and he did not file any such answer denying the authority of the plaintiff to bring the action. Under the provisions of the statute quoted, the allegations of the complaint, as to the authority by virtue of which the plaintiff sued or the capacity in which appellant was sued, could not be put in issue except by a plea in abatement. As

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such facts were not put in issue, it was not incumbent on plaintiff to offer proof to sustain them. *Ayers v. Foster* (1900), 25 Ind. App. 99, 57 N. E. 725; *Elkhart Car Works Co. v. Ellis* (1888), 113 Ind. 215, 15 N. E. 251; *McNulta v. Lockridge* (1891), 137 Ill. 270, 27 N. E. 452, 31 Am. St. 362; *McNulta v. Ensich* (1890), 134 Ill. 46, 24 N. E. 631.

The further point is made by appellant, that the evidence wholly fails to show that the operation of the road and of the car which caused the injury complained of was

4. under the control and management of the receiver and his servants at the time of such injury. This was one of the material facts necessary to a recovery, and it was put in issue by the general denial. *Indianapolis St. R. Co. v. Lawn* (1903), 30 Ind. App. 515, 66 N. E. 508; *Citizens St. R. Co. v. Stockdell* (1902), 159 Ind. 25, 62 N. E. 21. If the jury was not justified in finding that the car which struck appellee's wagon and caused his injury was at the time under the management and control of the employes of the receiver, the verdict cannot stand. A jury may

5. be justified in finding a fact to be true in several ways: (1) The fact may be admitted; (2) the court may take judicial notice of such fact; (3) the evidence may directly prove the fact; (4) the fact may be rightly and reasonably inferred by the jury from other facts which are either admitted, or proved by the evidence, or taken notice of judicially by the court.

There is no direct evidence that the men in charge of the car which caused appellee's injury were in the employ of appellant as receiver. It is admitted by the pleadings that appellant was the receiver of the Indianapolis and Cincinnati Traction Company, and the evidence shows without controversy that said company was the owner of the tracks on Prospect street on which the car was running at the time it struck appellee's wagon, and that said car was one of the cars of said company known as the "Connersville Dispatch." The employes in charge of the car testified that

they were employed by the Indianapolis and Cincinnati Traction Company.

The appointment of a receiver for a corporation does not affect the title or ownership of the property of such corporation unless a sale of such property is made in the

6. due administration of the trust, and in that event the title to the corporate property remains in the corporation until such sale. The whole effect of such a decree is to take the custody, control and management of such corporation out of the hands of the directors and officers of the corporation, and place the same in the custody and under the control of the receiver, to be managed under the orders of the court. *Louisville, etc., R. Co. v. Cauble* (1874), 46 Ind.

277. It being admitted that the Indianapolis and

7. Cincinnati Traction Company was in the hands of a receiver, and that Charles L. Henry was such receiver, and it further appearing from the evidence that the car which collided with appellee's wagon and caused the injury was one of said company's cars running on its tracks, we think that the jury was warranted in inferring that the car was being operated under the control and management of said receiver, his agents and servants.

We will next consider the evidence bearing on the question of contributory negligence. Appellant claims that the un-

disputed evidence shows that appellee being in a place
8. of safety immediately before the collision, suddenly and without warning turned onto the tracks directly in front of the car, and in such close proximity as to make it impossible for those in charge of the car to prevent the collision by stopping the car or by taking other precautions. It appears from the evidence that the Indianapolis and Cincinnati Traction Company maintained a double track on the extension of Prospect street in the city of Indianapolis, which is a street extending east and west; and that the south track was used by cars going east, and that the north track was used by cars going west. It also appears that the colli-

sion occurred east of the city limits, at a point where the Belt Railroad maintained a viaduct over said street, supported by walls on each side thereof. There was also testimony tending to prove that the tracks and road were so constructed, at the place where they passed under the viaduct, that a person using a wagon or other vehicle could not drive through the viaduct without entering on the tracks.

The conditions thus shown to exist rendered the op-

9. eration of cars dangerous to travelers on the highway

at that point. Those in charge of electric cars approaching this point were bound to know that persons using the highway with wagons and other vehicles had a right to pass through such viaduct, and that in so doing they would necessarily enter on the tracks, and thus be exposed to danger, and it was their duty so to regulate the speed of cars approaching this point as not to expose persons so using the highway to unnecessary danger and to use such care and caution in the general management and operation of the cars at that point as was required by the known danger to which other travelers on the highway were exposed.

8. Appellee was traveling on said highway in a wagon

going west and the car which collided with his wagon also came from the east on the north track. When appellee approached and entered the subway, the evidence tends to show that he was on the south side of the highway on the south track, and that before he emerged from beneath the viaduct he saw a car coming from the west on the south track, and that, for the purpose of getting out of the way of the car going east, he turned to the north onto the north track, where he was struck by an interurban car running at a high rate of speed and approaching from his rear. There is evidence tending to show that when two cars are side by side under this viaduct, there is no place that a wagon can pass, and that the only way in which a driver of such a vehicle can escape from one of the tracks at that point is by going on the other. There was evidence that

appellee looked back along the track at a point about six hundred feet east of the viaduct, and saw no car approaching, and that a train of cars was passing over the viaduct making considerable noise, which might have prevented him from hearing the approach of the car, or from hearing any signals of such approach. There was a conflict in the testimony, but the jury was the exclusive judge of the credibility of the witnesses and of the weight of the evidence. The jury was clearly warranted in finding that appellant was negligent in operating its car at the high and dangerous rate of speed shown by the evidence as it approached the viaduct, and we think that it was also warranted in finding in favor of appellee on the question of his contributory negligence.

10. Where the evidence on the question of contributory negligence is of such a character that one man of ordinary intelligence and honesty might draw an inference of negligence, and another of equal intelligence and honesty might draw the opposite inference, the question is one of fact for the jury, and its finding will not be disturbed on appeal. *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 77 N. E. 945.

It is true that appellee did not look back immediately before he turned upon the north track, but it must be borne in mind that the track on which the car was being operated was laid longitudinally in the highway on which appellee was traveling, so that the rule in respect to looking and listening, which applies to travelers on highways when approaching the crossing of a steam railway, did not apply in all its strictness to appellee. *Indianapolis St. R. Co. v. Schmidt* (1905), 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478. As said by the court in the case of *Indianapolis St. R. Co. v. Marschke, supra*. "While we recognize that the right of the company is superior in point of precedent, that the driver should not obstruct the operation of the cars, and that a person who without care drives along the track may subject himself to the charge of contributory negli-

gence, yet where, as here, there was an excuse for driving near the track, and some degree of care exercised in respect to looking and listening, a short time before the injury, and with the burden resting on appellant to show contributory negligence, we hold that it is not error to submit the question to the jury. It must not be forgotten that a person driving along a street railroad track in broad daylight has a right, at least in some degree, to indulge in the supposition that if a car is approaching from the rear a proper lookout is being maintained thereon, and that ordinary care not to injure him will be exercised.”

Appellant has saved exceptions to the giving of certain instructions by the court, and also to the refusal of the court to give certain instructions tendered by appellant. It would unduly extend this opinion to discuss each of these instructions separately. We have examined the instructions given, and are of the opinion that they fully and fairly present the law applicable to the case. The instructions given are criticised on the ground that they contain general abstract propositions of law, and that they are not so framed as to apply the propositions of law stated therein directly to facts which the evidence tends to prove. It is true that a

party has a right to have the jury instructed definitely and specifically as to the law applicable to the facts which the evidence tends to prove, if such instructions are properly and seasonably requested, and are within the issues; and where evidence is offered by a party tending to prove a state of facts within the issues, and he claims that such facts are proved, he is entitled to an instruction submitting such hypothetical state of facts to the jury, and advising them as to the law applicable to such state of facts, provided they find such facts to be established by the evidence. *Carpenter v. State* (1873), 43 Ind. 371.

The instructions given in this case are not open to the criticism that they do not apply to the specific evidence introduced at the trial in all its details. It is true that the

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instructions given, defining the care required of plaintiff, and the precautions which he was required to use before driving upon the tracks of the defendant, were so worded as to be applicable to any person under like conditions and circumstances; but the circumstances and conditions referred to in the instructions given were so applicable to the state of facts, which defendant claimed the evidence established in respect to the conditions and circumstances surrounding plaintiff at and immediately before the injury, that the jury could not have failed to make the proper application of the law to the facts which the evidence tended to prove.

The instructions refused were fully covered by those given. Taken as a whole, the instructions given were as favorable to appellant as he had a right to ask, and we are of the opinion that the jury could not have failed to understand the law applicable to the case, and that it was not in any way misled by the instructions given.

Judgment affirmed.

NOTE.—Reported in 95 N. E. 275. See, also, under (1) 38 Cyc. 1884; (2) 31 Cyc. 678; (3) 34 Cyc. 442; 31 Cyc. 529; (4) 34 Cyc. 442; (5) 3 Cyc. 348; (6) 34 Cyc. 183, 184; (7) 33 Cyc. 733; (8) 33 Cyc. 889, 893; (9) 33 Cyc. 791; (10) 29 Cyc. 631; (11) 33 Cyc. 831; (12) 38 Cyc. 1703; (13) 38 Cyc. 1617. As to a receiver's liability in his official capacity for torts imputable, but for the receivership, to the constituent, see 120 Am. St. 280. As to the relative rights of a street car company and the driver of a vehicle in using a highway, see 25 Am. St. 475. For a discussion of the duty and liability of a street railway as to vehicles moving along its tracks, see 7 Ann. Cas. 1127; 18 Ann. Cas. 510.

BROWN v. THE MARION COMMERCIAL CLUB.

[No. 7,377. Filed March 15, 1912. Rehearing denied June 18, 1912.]

1. SUBSCRIPTIONS.—*Nature.—Joint or Several Liability.*—A subscription is several, where a default by one subscriber will not affect the liability of any other. p. 674.
2. CONTRACTS.—*Inducement and Consideration for Contract.—Consideration.—Sufficiency.*—While there is a difference between in-

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ducement or motive to enter into a contract, and the consideration yielding for its support, yet, in the absence of fraud or mistake, the consideration regarded as such or fixed by the parties thereto will be deemed sufficient. p. 676.

3. **CONTRACTS.—*Mutual Promises.—Consideration.***—Mutual promises, whereby there is a mutuality of engagement, are based on sufficient consideration. p. 676.
4. **SUBSCRIPTIONS.—*Consideration.***—The consideration for a subscription contract may consist of a benefit to the promisor or of a detriment to the promisee. p. 676.
5. **SUBSCRIPTIONS.—*Factory Bonus.—Consideration.—Revocation.***—A subscription to a fund, to provide bonuses for the location of additional factories in a city, is not revocable before bonuses are paid or agreed to be paid, on the theory that liability to pay does not attach until some liability has been assumed, or some expense incurred by the promisee, since the real consideration, where the object to be accomplished is of interest to all and is not likely to be attained except by combined performance, is the promise which others have made or will make by subscribing to the same object. p. 677.
6. **SUBSCRIPTIONS.—*Actions.—Answer.—Evidence.—Admissibility.***—In an action against a subscriber to a factory bonus fund, where plaintiff is required to allege and prove its agreement to pay a bonus for the location of a factory, by reason of which defendant's subscription is due, evidence showing that items of indebtedness did not accrue to plaintiff because of any agreement to pay a bonus for the location of a factory, is admissible under the general denial. pp. 679, 683.
7. **APPEAL.—*Review.—Harmless Error.—Sustaining Demurrer to Answer.***—Sustaining a demurrer to an answer pleading facts which may be proved under the general denial is not reversible error. p. 680.
8. **SUBSCRIPTIONS.—*Factory Bonus.—Action.—Defense.***—It is no defense to an action on a subscription to a factory bonus fund, that factory owners, with whom agreements to pay bonuses had been entered into, had forfeited their contracts and moved their factories elsewhere, where the subscription matured by plaintiff's agreement to pay bonuses, and the form of the agreement was left to the parties making it, and the subscription provided that bonuses returned under forfeited agreements should be used in the location of other factories. p. 680.
9. **SUBSCRIPTIONS.—*Factory Bonus.—Action.—Defense.***—In an action by a commercial club on a subscription to a factory bonus fund, the fact that bonus agreements were made with certain officers, directors and stockholders of the club or with corporations in which they were directly interested, is no defense, in the

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absence of fraud in such agreements which entered into or in any manner influenced the subscription. pp. 681, 682.

10. SUBSCRIPTIONS.—*Misapplication of Funds.—Defense.*—Where a subscription becomes due, payment cannot be refused on the grounds that the funds will be misapplied, since if the money is not properly applied the subscriber has his remedy. p. 682.
11. SUBSCRIPTIONS.—*Limiting Time and Amount of Payment.—Defense.*—Where a subscription to a factory bonus fund provided that no more than fifty per cent of the subscription would become due in any one year, defendant, having failed for two years to pay any part of his subscription, cannot avoid the payment of any part of his subscription because of plaintiff's failure to enforce the payments as they became due. p. 683.
12. SUBSCRIPTIONS.—*Factory Bonus.—Liability of Subscriber for Expense Incurred.*—A subscription to a bonus fund for the location of factories does not render the subscriber liable for the payment of expense incurred in procuring factories to be located. p. 683.
13. APPEAL.—*Review.—Disposition of Cause.—Reversal.*—A cause will be reversed and a new trial ordered, where, on a careful consideration of the case as disclosed by the record, the court deems that justice will be best subserved thereby. p. 685.

From Grant Circuit Court; *Henry C. Fox*, Special Judge.

Action by The Marion Commercial Club against William A. Brown. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Condo & Browne, for appellant.

W. S. Marshall, W. H. Carroll, Miller, Shirley & Miller, for appellee.

MYERS, J.—Appellee brought this action against appellant on the following written instrument:

“Whereas, The Marion Commercial Club of Marion, Indiana, realizing the necessity of locating manufacturing industries in said city, in order to continue its prosperity and build a larger city, is using its influence and its officers and members are putting forth great efforts to induce manufacturing industries to locate in and adjacent to the city of Marion, Indiana, and

Whereas, we, realizing that it is impossible to locate good substantial industries without giving to them bonuses or financial assistance, and further realizing that the benefit that will accrue to the business and

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property interests in the city of Marion, Indiana, by the location of additional manufactures in and within the vicinity thereof,

We, whose names are signed hereto, do each for himself and herself hereby agree to pay to The Marion Commercial Club of Marion, Indiana, that portion of all amounts by it agreed to be paid to all manufacturing industries that it may succeed in locating in or in the vicinity of Marion, Indiana, within two years from the first day of April, 1905, set opposite our respective names, provided that said sum so donated shall not exceed \$50,000 in any one year, said sums payable as the said The Marion Commercial Club may designate, but never more than 25 per cent of the subsidy granted any one manufacturing concern to be payable in any period of thirty days, and in the event of the death of the subscriber or his or her removal from Marion, Indiana, the subscriptions made by him, her or them, shall be null and void from the date of death or removal. It is hereby further agreed and understood by the subscribers hereto that if in the location of any manufacturing industry, any amount shall be by them repaid to said The Marion Commercial Club, that it shall have the right and is hereby empowered and directed to use the same in the location of any other manufacturing industry it may desire.

The sums so subscribed by us are payable without any relief from valuation or appraisement laws of the State of Indiana.

Witness our hands this 27th day of February, 1905,

Name

WILLIAM A. BROWN.

Per cent— $\frac{1}{2}$ ''

The complaint alleges that on and prior to February 27, 1905, appellee procured from appellant and other citizens of the city of Marion, subscriptions to a \$100,000 factory fund; that said fund was donated for the purpose of locating manufacturing industries in said city; that by virtue of said subscription contracts, appellee, between February 6, 1906, and March 20, 1907, entered into certain contracts with certain manufacturers for the location of their respective industries in said city and vicinity, and agreed to pay to each of said manufacturers a certain per cent or amount as

a donation from said factory fund so raised by said subscriptions, which donations, together with \$2,000 to appellee for expenses in locating said factories, aggregated the sum of \$100,000; that it agreed to pay the several amounts stated; that appellant's subscription is due and wholly unpaid, and that appellant has been assessed for the purposes aforesaid the amount subscribed by him, and that notices of such assessment were duly given to appellant from time to time as the donations were made to manufacturing industries aforesaid.

Appellant answered in eight paragraphs. The first was a general denial. A demurrer was sustained to all the other paragraphs except the third, to which no demurrer was addressed. This paragraph proceeded on the theory of no consideration for the execution of the contract in suit.

The second paragraph shows that subsequent to the signing of said written subscription, and before appellee made or entered into any agreement whatever with either of the several owners of manufacturing industries mentioned in the complaint, and before it agreed to pay any sum of money whatever as a subsidy or otherwise to either or any of said owners for the location of their respective manufacturing industries, appellant revoked and withdrew his subscription and offer, and notified appellee of such revocation and withdrawal. This paragraph proceeds on the theory that nothing short of a contract between promisee and a third party to locate an additional manufacturing enterprise in or near the city of Marion will suffice as a consideration for appellant's subscription.

We agree with appellant that the subscription relied on by appellee is several, not because the particular paper was signed by him alone, but because his default would

1. not affect the liability of any other subscriber, nor would the failure of any other subscriber to pay increase or diminish appellant's liability. *Landwerlen v.*

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Wheeler (1886), 106 Ind. 523, 5 N. E. 888; *Davis & Rankin Bldg., etc., Co. v. Hillsboro Creamery Co.* (1894), 10 Ind. App. 42, 37 N. E. 549; *Davis & Rankin Bldg., etc., Co. v. Booth* (1894), 10 Ind. App. 364, 37 N. E. 818; *Price v. Grand Rapids, etc., R. Co.* (1862), 18 Ind. 137; *Davis & Rankin Bldg., etc., Co. v. Barber* (1892), 51 Fed. 148; *Davis v. Belford* (1888), 70 Mich. 120, 37 N. W. 919; *Los Angeles Nat. Bank v. Vance* (1908), 9 Cal. App. 57, 98 Pac. 58.

The wording of the subscription clearly contemplates that it is one of a number of like import, signed by others subscribing to the common fund. Its language is not ambiguous, uncertain nor indefinite when considered in the light of the inducement which influenced it, the circumstances under which it was made, the situation of the parties and the nature of their business. Hence the answer to the present question is largely dependent on legal principles applicable to that class of promises to which the one under consideration belongs.

It is said that before any agreements were made with the various owners of manufacturing industries named in the complaint, appellant gave appellee notice that he would not pay the amount subscribed by him, and that he revoked his subscription. Appellant's right so to do is put on the ground that the alleged contract lacked mutuality, and that it was a mere gratuitous promise at the time he sought to revoke it. In support of this contention he cites a large number of cases, among them *Twenty-third Street Baptist Church v. Cornell* (1890), 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; *Presbyterian Church of Albany v. Cooper* (1889), 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. 767; *Grand Lodge, etc., v. Franham* (1886), 70 Cal. 158, 11 Pac. 592; *Pratt v. Trustees, etc.* (1879), 93 Ill. 475, 34 Am. Rep. 187; *Wardwell v. Williams* (1886), 62 Mich. 50, 28 N. W. 796, 4 Am. St. 814; *Solomon v. Penoyar* (1891), 89 Mich. 11, 50 N. W. 644; *Cottage Street M. E. Church v.*

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Kendall (1877), 121 Mass. 528, 23 Am. Rep. 286; *Doherty v. Arkansas, etc., R. Co.* (1905), 142 Fed. 104, 73 C. C. A. 328.

It is claimed that the recitals in the contract which precede appellant's covenant to pay, were an inducement or motive, and not a consideration for its execution; that he agreed to pay in case appellee bound itself to pay, and therefore the consideration for his promise was the liability of appellee on its agreement with manufacturers.

While there is a difference between inducement or motive to enter into a contract, and the consideration yielding for its support (*Clark v. Continental Improve. Co.* [1877],

2. 57 Ind. 135; *Standley v. Northwestern, etc., Ins. Co.* [1884], 95 Ind. 254; *Warey v. Forst* [1885], 102 Ind. 205, 26 N. E. 87), yet in the absence of fraud or mistake the consideration regarded as such or fixed by the parties thereto will be deemed sufficient. *McNutt v. McNutt* (1889), 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; *Wolford v. Powers* (1882), 85 Ind. 294, 44 Am. Rep. 16. As said in the case last cited: "It is the general rule that where there is no fraud, and a party gets all the consideration he contracts for, the contract will be upheld." Mutual

3. promises, whereby there is mutuality of engagement, are not without a sufficient consideration. *Davis v. Calloway* (1868), 30 Ind. 112, 95 Am. Dec. 671; *City of Lyons v. Kelley* (1909), 6 Ga. App. 367, 65 S. E. 44; *Curry v. Kentucky Western R. Co.* (1904), 25 Ky. Law 1372, 73 S. W. 435; *Shelby County R. Co. v. Crow* (1909), 137 Mo. App. 461, 119 S. W. 435. These observations apply

4. to contracts generally, but it has not been infrequently said by courts, in passing on subscription contracts, that "a consideration may consist of a benefit to the promisor or of a detriment to the promisee". *Richelieu Hotel Co. v. International Military Encampment Co.* (1892), 140 Ill. 248, 264, 29 N. E. 1044, 33 Am. St. 234.

But looking specially to the contention of appellant, a fair

interpretation of the subscription before us evidently contemplates the location of additional manufacturing industries by appellee, on such terms in the way of bonuses, payable out of the fund subscribed, as might be agreed on, providing that such agreement is not inconsistent with the authority conferred by the subscriber. The covenant to pay had the effect of fixing the time and amount to be paid by the subscriber, that is to say, the execution of a contract for the location of a factory matured the subscription in the amount fixed by the per cent agreed to be paid as a bonus. The enterprise was in the interest of the general public in that vicinity, and the subscription voluntary. It was made payable, and formally delivered to a legal entity engaged solely in promoting the general commercial prosperity of the city of which the subscriber is a resident. The payee was authorized to receive the subscription, collect the money thus subscribed, and to make contracts for its disposition, limited only by the conditions imposed by the subscriber. This subscription is not ruled by the doctrine applicable to rewards for the arrest of criminals, and other similar matters, made by proclamation or by newspaper advertisement, which might be withdrawn before performance; for in such cases nothing short of performance, which is open to any one, will amount to an acceptance, while in this case appellee alone was authorized to accept it. Agreements between appellee and third parties, whereby bonuses to the full amount of the fund subscribed were to be paid for the location of additional factories pursuant to the conditions of the subscription, would undoubtedly be regarded as full performance, and unquestionably an acceptance. But here there was not full performance before notice of revocation, consequently the question for decision is governed in many respects by legal principles controlling voluntary subscriptions to specific charitable, religious or other such purposes, where complete performance is not required to constitute an acceptance. In the last class of cases the rule is, that while

the promise may have been gratuitous, and not enforceable for want of mutuality, yet the assumption of any liability, or the incurring of any expense by the promisee on the faith of such promise, before notice of withdrawal, will furnish a sufficient consideration to bind the promisor. 1 Parsons, Contracts *453; *Miller v. Ballard* (1868), 46 Ill. 377; *Cottage Street M. E. Church v. Kendall, supra*; *Des Moines University v. Livingston* (1881), 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42; *McCabe v. O'Connor* (1886), 69 Iowa 134, 28 N. W. 573; *Johnson v. Otterbein University* (1885), 41 Ohio St. 527; *Trustees, etc., v. Fleming* (1874), 73 Ky. 234; *Richelieu Hotel Co. v. Military Encampment Co., supra*; *Rogers v. Galloway Female College* (1898), 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; *Northwestern Conference, etc., v. Myers* (1871), 36 Ind. 375; *Trustees, etc., v. Garvey* (1870), 53 Ill. 401, 5 Am. Rep. 51; 1 Page, Contracts §298.

The complaint shows that appellee did enter into agreements whereby additional factories were located in the city of Marion, and on the faith of appellant's subscription it agreed to pay certain bonuses. The answer avers a withdrawal by appellant of his subscription before said contracts were entered into, or any money paid to manufacturers, but it does not appear that this was done before the subscription was acted on in such a manner as to raise a consideration for his promise.

The authorities are not harmonious "concerning the grounds, as well as the nature and extent of the liability of subscribers in cases like this." *Hodges v. Nalty* (1902), 113 Wis. 567, 89 N. W. 535; *Higert v. Trustees, etc.* (1876), 53 Ind. 326. Our conclusion that this answer is insufficient is based on what we regard as the weight of authority, and it is supported by the decisions in this State, which seem to be founded on the principle that where there are a number of subscribers to a common fund for the accomplishment of an object of interest to all, and not likely to be attained except by combined performance, the real consideration for the sub-

scriber's promise is the promise which others have already made or will make by subscribing to the same object. *Peirce v. Ruley* (1854), 5 Ind. 69; *Higert v. Trustees, etc.*, *supra*; *Petty v. Trustees, etc.* (1883), 95 Ind. 278; *Bryan v. Watson* (1891), 127 Ind. 42, 26 N. E. 666, 11 L. R. A. 63.

The fourth paragraph is a partial answer addressed to certain items in the complaint alleged to be appellant's percentage of bonuses or donations appellee agreed to

6. pay manufacturers whose factories, according to the averments of this paragraph, are not additional to those located in the city of Marion at the time of signing said written subscription, but were manufacturing industries then located and established in that city. Appellee procured from appellant a subscription to what was known as a "factory fund", which appellee was to use in the business in which it was then engaged, namely, inducing manufacturing industries to locate in or within the vicinity of Marion. By the terms of the subscription, the amounts subscribed became due and payable to appellee in payments. The amount of each payment, and the time when due, was fixed by the bonus agreements. Any evidence which tended to show that the items of indebtedness in question did not accrue to appellee because of agreements to pay bonuses for the location of factories was admissible under the general denial, on the theory that it would tend to reduce the amount of appellee's recovery. *Gwinnup v. Shies* (1903), 161 Ind. 500, 69 N. E. 158; *Indiana Trust Co. v. Finitzer* (1903), 160 Ind. 647, 67 N. E. 520; *Blizzard v. Applegate* (1878), 61 Ind. 368; 1 Thornton, Civil Code 528, note 2. The burden was on appellee to allege and prove its agreement to pay a bonus for the location of a manufacturing industry, on account of which, and by reason of appellant's subscription agreement, the payments demanded were due from him, and unpaid. "Under the general denial, a defendant may introduce any proof that will meet what the plaintiff is bound to prove in order to recover." *Kirshbaum*

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v. Hanover Fire Ins. Co. (1897), 16 Ind. App. 606, 7. 45 N. E. 1113. Sustaining the demurrer to the fourth paragraph of answer was not reversible error. *Jeffersonville Water Supply Co. v. Riter* (1897), 146 Ind. 521. 45 N. E. 697; *Cheney v. Unroe* (1906), 166 Ind. 550, 77 N. E. 1041, 117 Am. St. 391.

The fifth paragraph is a partial answer addressed to certain items in the complaint aggregating \$50, and agreed to be paid by appellee to designated parties as bonuses 8. for the location of certain factories in the city of Marion. This answer contained a copy of the contract between appellee and such factory owners, whereby it appears that the former agreed to pay the latter the proceeds it was able to collect from stated per cent assessments against the subscribers to its \$100,000 factory fund. It is also averred that since said agreements were entered into, said factory owners have forfeited their contracts with appellee, and removed their factories from Marion and its vicinity.

This answer proceeds on the theory that in order to hold appellant liable on his subscription, appellee was bound to allege and prove an unqualified agreement on its part to pay bonuses, before it could compel payment by appellant. There is no merit in this contention. Appellee contracted with reference to appellant's subscription. Its agreement to pay bonuses for the location of factories matured the subscription to the amount of the per cent required to pay appellant's portion of such bonuses, and the form of such agreement was left to the parties making it.

The subscribers, under a provision in the subscription contract, released to appellee all claims to repayments made by manufacturers, and expressly authorized it to use such repayments in the location of other manufacturing industries. There is no provision for the return of a payment to the subscriber, so that if appellant had paid when due his portion of the forfeited bonuses, the fact of forfeiture would

give him no right to claim its return. Nor should the fact alone that he failed to pay give him a better standing than he would have had by complying with his agreement. His contract was not with the manufacturer, but with appellee. His defense is based on the former's default of a contract to which he was not a party, nor in privity with either of the contracting parties in that contract, and cannot be sustained. *Lewis v. Brookdale Land Co.* (1894), 124 Mo. 672, 28 S. W. 324.

The seventh paragraph is also a partial answer addressed to \$445 of the recovery sought in this action. By this paragraph it is averred that \$435 was donated by appellee to manufacturers named in the complaint, whose stockholders, officers and directors were, at the time each donation was made, also stockholders, officers and directors of appellee, and that appellant was assessed \$10 to pay the expenses of appellee in locating factories.

It is the theory of this paragraph that appellee ought not to recover said \$435 so assessed against and demanded of appellant for the reason that, if collected, it will be distributed and paid to certain named manufacturers, who are not only stockholders, officers and directors, respectively, of appellee, but also in some instances officers, directors and stockholders in corporations which are to receive part of said fund; that so to distribute and pay out said fund would be in violation of the trust reposed in appellee to collect, handle and donate the same as trust funds; that its donation and distribution so as to inure to the special benefit of appellee's stockholders, directors and officers would amount to a fraud, and render invalid the bonuses so agreed to be paid.

If the subscribers receive the consideration for which they contract, in this respect, that is all they can demand. There is no claim that the alleged fraud entered into, or in any manner influenced appellant's subscription, nor that the fund thus subscribed will be misappropriated or used for any other purpose than as stipulated in the subscription.

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The fact alone, that bonus agreements were made with certain officers, directors and stockholders of appellee, or with corporations in the management of which they were directly interested, does not necessarily render such agreements void.

Hill v. Nisbet (1885), 100 Ind. 338. If appellee did

10. agree to pay bonuses for the location of factories, appellant will not be heard to say he will not pay because the money will be misapplied. "The subscription must be paid when due, and if an attempt is afterwards made to use the money in a way different from that stated in the subscription, the subscriber has his remedy." *Roth- enberger v. Glick* (1899), 22 Ind. App. 288, 52 N. E. 811. See, also, *Cravens v. Eagle Cotton Mills Co.* (1889), 120 Ind. 6, 14, 21 N. E. 981, 16 Am. St. 298.

We are not impressed with the thought that this is a case where the relation of trustee and *cestui que trust* exists.

Appellant's agreement was to pay a certain specified

9. amount of money on certain stipulated conditions.

Appellee's compliance with those conditions entitled it to enforce payment of the subscription. The relation of appellant and appellee is not the same as if a fund like the one here in question was subscribed, and someone appointed to receive and disburse it as directed by the instrument of his appointment, and where there is a duty devolving on such appointee to report his doings to the persons subscribing to the fund. In this case it does not appear that the officers and directors in charge of the finances and other affairs of appellee were under any obligation to anyone except the stockholders and members of the corporation which they represented. Appellee was engaged in locating factories, and was proposing to offer bonuses as an inducement for their location at the city of Marion. In order that it might carry out its purpose, it solicited and obtained subscriptions to what was known as a factory fund. The initiative in raising this fund was not taken by the subscribers, nor does it appear that the fund was raised and placed in

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appellee's hands for disposition. The subscription was merely a promise to pay when appellee needed it to pay bonuses. With this view of the relation existing between the parties to this controversy it would seem that appellee was not authorized to collect from the subscribers anything for

expenses in locating factories. But as to the item of

6. \$10 mentioned, the demurrer was properly sustained to the paragraph, for the reasons stated in passing on the sufficiency of the fourth paragraph.

The eighth paragraph is a partial answer addressed to forty per cent of the recovery sought in this case, and avers that appellee, during a period of one year, entered

11. into contracts with manufacturers whereby it agreed to pay bonuses out of said fund to manufacturers aggregating \$90,000, and attempted to assess against appellant his portion of said donations, in violation of a condition in the contract wherein no more than \$50,000 of said fund was to be appropriated in any one year for the purposes therein stated.

This answer cannot be sustained, for the reason that at the time this action was begun, more than two years from April 1, 1905, had expired. That provision in the contract, brought in question by this paragraph, was intended by the subscribers to limit the amount of their payments during any given year. Whatever action appellee might take in the way of agreements to pay bonuses, no more than fifty per cent of the subscriber's subscription would be due in any one year. Two years having elapsed, and appellant having failed to pay any part of his subscription, he cannot now be heard to say that the failure of appellee to enforce payment as his subscription became due, will release him from any part of his obligation.

It is next insisted that the special finding of facts does not sustain the conclusions of law. The findings show

12. that through the activity of appellee a fund of \$100,000 was subscribed for the purpose of locating man-

ufacturing enterprises in the city of Marion and in the vicinity thereof; that said subscriptions were in writing, one of which was executed by appellant for \$500, and is the foundation of this action; that appellee, in furtherance of said movement, entered into contracts with various factory owners for the location of factories in the city of Marion, whereby it agreed to pay to such owners the proceeds from certain per cent assessments on the subscribers to said fund; that the subscribers, including appellant, were assessed in proportion to the several amounts so agreed to be paid, aggregating \$98,000, and \$2,000 for the purpose of meeting expenses incurred by appellee in locating said factories. For this latter purpose appellant was assessed \$10, and for the purpose of paying bonuses for the location of factories, \$490. On the facts found, the court concluded that the law was with appellee, and that it was entitled to recover from appellant \$500 with interest thereon, etc.

From what we have said in disposing of other questions in this case, it is evident that we cannot agree with the trial court in its conclusions of law. It is quite clear that our disagreement with the conclusions reached by the trial court comes from a different view of the subscription contract, and the relation which the parties thereto bear to each other. As we see the contract, it was enforceable against the subscribers only as the assessments were made for the purpose of paying bonuses for the location of factories. The findings show that \$2,000 of the fund subscribed was not for this purpose at all, and that appellant's portion of that amount was \$10, which, according to the conclusions of law, he should pay. This conclusion was necessarily founded on the theory that appellee acted in the capacity of a trustee for the subscribers, and as such was authorized to charge them with all necessary expenses incurred, as for administering a trust. Appellee made its own proposition, and while it was not compelled to carry it out, yet if it did so, it must be on the terms and conditions provided in its contract

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with the subscribers. It, no more than any one else, will be allowed to induce parties to engage to pay money for one purpose, and then require them to pay it for another, because without such payment performance of the contract will be a hardship on it. *Rothenberger v. Glick, supra; Board, etc., v. South Bend, etc., St. R. Co.* (1889), 118 Ind. 68, 20 N. E. 499; *Taylor v. Fletcher* (1850), 15 Ind. 80; *Moore v. Campbell* (1887), 111 Ind. 328, 12 N. E. 495.

The conclusions of law were erroneous (*Helms v. Wagner* [1885], 102 Ind. 385, 390, 1 N. E. 730), and as the judgment was for \$570, an amount not authorized by the ultimate facts found, this error cannot be considered harmless. After a careful consideration of this case as disclosed by the record, we have concluded that justice will be best subserved by a new trial.

Judgment reversed, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Felt, C. J., Hottel, Lairy, Ibach and Adams, JJ., concur.

NOTE.—Reported in 97 N. E. 958. See, also, under (1) 37 Cyc. 502; (2) 9 Cyc. 365; (3) 9 Cyc. 323; (4) 37 Cyc. 491; (5) 37 Cyc. 492; (6) 37 Cyc. 503; (7) 31 Cyc. 358; (8) 37 Cyc. 500; (10) 503-New, Cyc. Ann. 3674; (12) 37 Cyc. 495; (13) 3 Cyc. 454. As to the necessity and sufficiency of an acceptance to make a subscription enforceable, see 17 Ann. Cas. 1076. As to the liability of persons subscribing for a public object, see 13 Am. Dec. 458; 79 Am. Dec. 510; 82 Am. Dec. 121. As to the liability on subscriptions to corporate stock, see 136 Am. St. 737.

GEIGER ET AL. v. TOWN OF CHURUBUSCO ET AL.

[No. 7,878. Filed April 5, 1912. Rehearing denied June 18, 1912.]

1. TRIAL.—*Findings.*—*Sufficiency.*—*Venire De Novo.*—In an action to enjoin the emptying of sanitary sewage into an open ditch, where the court found that the use of the sewer did not cause overflows on the lands of the plaintiffs, that the flow of waters in the ditch was sufficient to dilute the filth and dirt so as to prevent it from producing an unhealthful condition along its

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course, and that the evidence failed to show that the property of the plaintiffs was damaged or reduced in value, was sufficiently definite to support a judgment, and a motion for *venire de novo* was properly overruled. pp. 687, 690.

2. **TRIAL.—Findings.—Venire De Novo.**—A *venire de novo* should not be granted unless the finding is so defective or uncertain on its face that it is incapable of supporting any conclusion of law, or of forming the basis of any judgment on the issue involved. p. 690.
3. **DRAINS.—Use.—Right to Use Surface Drain for Sanitary Sewage.—Municipal Corporations.**—A city that has been assessed for the construction of a public ditch for the drainage of surface water, has, by virtue of such assessment, the right to drain the surface water from its streets and alleys into and through the same, but does not have the right to use such ditch as an outlet for sanitary sewage from buildings located on private lots not assessed. p. 690.
4. **INJUNCTION.—Grounds.—Improper Use of Drain by Municipal Corporation.**—Where a city was entitled to use a public ditch for the drainage of the surface water from its streets and alleys, its wrongful use thereof as an outlet for sanitary sewage will not be enjoined, where it does not appear that any of the plaintiffs have suffered, or will suffer any serious loss or inconvenience by reason of such use for which there is no adequate remedy at law. p. 691.
5. **APPEAL.—Review.—Findings.—Evidence.**—If a finding of the trial court is supported by some evidence, although conflicting, it cannot be disturbed on appeal. p. 692.

From Whitley Circuit Court; *Luke H. Wrigley*, Judge.

Action by Edward Geiger and others against the Town of Churubusco and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

Gates & Whiteleather, Leonard & Townsend, for appellants.

W. F. McNagny and *E. K. Strong*, for appellees.

LAIRY, J.—This action was brought in the Whitley Circuit Court by appellants to restrain the town of Churubusco and the contractors from constructing a storm and sanitary sewer within the town of Churubusco, and connecting the same with an open ditch outside of the corporate limits.

The material facts as found by the court show that in 1903 the board of county commissioners, on a petition, constructed an open drain, commencing near the eastern

1. boundary of the town, thence running in a southeasterly direction and connecting with a drain or ditch across the county line in Allen county, and finally terminating in a small creek known as Grass creek. From the point where the open ditch commenced, the commissioners, in pursuance of the same petition and as a part of the same ditch, which is known as the Tope ditch, constructed two twenty-inch tile branches, one running in a southeasterly direction and the other in a southwesterly direction across the town limits and into the town.

Appellants Geiger and Smith each owned about two acres of land just east of the town limits, through which one of the branches of the tiled portion of the ditch in question passed, and appellant Duglay was the owner of about seven acres of land lying outside of the town limits, through which the open portion of the main line of the ditch extended. The lands owned by each of the appellants were assessed in small amounts for the cost of constructing this ditch, and the town of Churubusco, in its corporate capacity, was assessed over \$1,300 of such cost on account of benefits to its streets and alleys. Prior to the construction of this ditch, the town had constructed tile drains, for the purpose of draining the surface-water from its streets and alleys, and after this time numerous other drains were made for a like purpose, and connected with the tile in the Tope ditch. In the year 1907 the town constructed a sewer extending along Main street, called the South Main street sewer, which connected with a branch of the Tope ditch, and was used to some extent for carrying sanitary sewage. The court also finds that before the construction of the Main street sewer, the open portion of the Tope ditch became obstructed just below the terminus of the tile, and it so remained until August 1, 1909, at which

time the obstruction was removed. During the time said ditch was so obstructed, the water was forced out of the tile drains in times of heavy rains, and overflowed the lands of Geiger and Smith, but since the removal of such obstruction no such overflow had occurred, although there had been heavy rainfalls since such removal. In times of heavy rains the water in the Tope ditch overflowed the channel, and spread out over said Duglay's land, and after the subsidence of such overflow a deposit, caused to some extent by the sanitary sewage, was left on the land so submerged, which deposit produced a strong and disagreeable odor for two or three days. East of the town and near the Tope ditch there is maintained a dumping ground, on which there is at all times a large quantity of decaying matter; and the water which flows off of said dumping ground in time of heavy rains runs down into the Tope ditch, and contributes in a material degree to such impurity as exists in the water which flows therein. Also the dirt and manure washed off the streets of the town, together with the filth from a barnyard on said Duglay's farm, are carried by surface-water down into said ditch, and contribute to the existing impurities of the water in such ditch. There is now, and for some time has been at all ordinary times, a constant flow of water one or two inches deep through the Tope ditch from its commencement to its terminus, which flow arises from the fact that such ditch and channel receives and carries off the overflow of water from the water-works plant in said town. Such flow is sufficient so to dilute the filth and dirt that have come down said ditch as to prevent it from producing offensive or unhealthy conditions along its course. In the year in which this action was commenced, the board of trustees of said town, acting under the statutes authorizing the construction of sewers by incorporated towns, adopted resolutions providing for the construction of a storm and sanitary sewer along West Whitley street, to connect with one of the

branches of the Tope ditch, and let the contract for the construction of the same. The sewer was to be constructed with a twelve- and fifteen-inch sewer tile and was to be used for surface drainage, and as an outlet for the sewage from eight or ten water-closets located in a school building attended by about two hundred pupils. It was also the purpose of the town to allow such of the citizens living along Whitley street, as desired to do so, to use said sewer for sanitary purposes. There is in force a duly-enacted ordinance of the town, authorizing the marshal thereof to grant to such of the citizens of said town as may desire the same, permits to tap the sewers of said town for the purpose of sanitary sewage. The court also finds "that the evidence fails to show, by a fair preponderance thereof, that any noisome, unhealthy or offensive conditions will, at ordinary times, be produced at any point between said town and said Grass Creek by the additional sanitary sewage which is likely to be carried into said ditch from said town at any time in the near future. That the evidence fails to show by a fair preponderance thereof, that any public or private nuisance has to this time been, or in the near future will be, produced at any point along said ditch and channel, either upon said Duglay farm in Allen County, Indiana, or elsewhere, by the flow of sanitary sewage from said town through said ditch and channel and also fails to show by a fair preponderance thereof, that any danger to the public health, or to the health of said Duglay or his family, or the other plaintiffs, or any other person, has been or in the near future will be, produced or created by the flow of sanitary sewage from said town through said ditch and channel. That the evidence fails to show, by a fair preponderance thereof, that said Duglay, or his said farm, or the other plaintiffs, or any of their property, in the past have been, or in the near future will be, injured or damaged by any of the acts, done or in the future to be done, of the defendants or either

of them, and that the evidence fails to show, by a fair preponderance thereof, that the value of said Duglay's said farm, or any other property of his, or the value of any property of said Geiger and Smith, or either of them, has been, or will be, reduced by any such act."

As its conclusions of law the court found that appellants take nothing by their suit, and that the appellees recover their costs.

The action of the trial court in overruling appellants' motion for a *venire de novo* is the first error relied on for reversal.

A *venire de novo* should not be granted unless the finding is so defective or uncertain on its face that it is incapable of supporting any conclusion of law, or of forming

2. the basis of any judgment on the issues involved.

Trustees, etc., v. Shoemaker's Estate (1898), 20 Ind. App. 319, 50 N. E. 594; *Bartley v. Phillips* (1888), 114 Ind. 189, 16 N. E. 508; *Waterbury v. Miller* (1895), 13 Ind. App. 197, 41 N. E. 383; *Graham v. State, ex rel.* (1879), 66 Ind. 386.

The finding in this case is not a model, but it is not

1. so indefinite or uncertain as to be incapable of supporting any judgment. There was no error in overruling this motion.

Appellants moved the court for judgment in their favor on the special findings, which motion was overruled, and this ruling is assigned as error. It is claimed on

3. behalf of appellants that the special finding states facts showing that the town of Churubusco had no right to drain the sewage from the water-closets in its school building into the sewer, and had no right to permit the occupants of private lots in the town to make connections with such sewer for sanitary sewage. It appears from the facts specially found that the Tope ditch, with which the sewer in question was to be connected, had been constructed under

the drainage laws of the State, from assessments on the property benefited. The town was assessed as a municipality, and by virtue of such assessment had the right to drain the surface-water from its streets and alleys and public grounds into and through such ditch, but it did not have the right by virtue of such assessment to use said ditch as an outlet for sanitary sewage from buildings located on private lots not assessed. If such use has the effect of impairing the usefulness of the ditch, for the purposes for which

4. it was constructed, or if it materially injures or damages the property of others assessed for the construction of such ditch, or if it injuriously affects the health of the owners or occupants of lands so assessed, or essentially interferes with their comfortable enjoyment of such lands, or if the contemplated use for such purpose will have such effect, then the use of said ditch as an outlet for sanitary sewage may be properly enjoined. The court will not interfere by injunction to restrain every act which is wrongful or unlawful. Before this remedy can be invoked successfully, it must appear that the person seeking said remedy is about to suffer some substantial injury, for which there is no adequate remedy at law.

The special finding of facts fails to show that plaintiffs or any one of them has suffered, or is about to suffer any such serious loss or inconvenience as would justify the court in granting an injunction. The burden of proof as to such facts rested on the plaintiffs, and a failure to find them is a finding against the plaintiffs as to such facts. *Spraker v. Armstrong* (1881), 79 Ind. 577; *Vannoy v. Duprez* (1880), 72 Ind. 26. The facts specially found by the court are not sufficient to warrant a judgment in favor of appellants, and the court committed no error in overruling this motion.

By the motion for a new trial, the sufficiency of the evidence to sustain the finding is called in question. We have examined the evidence in the case, and especially that part in

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reference to the loss and injury which has resulted or
5. is likely to result to appellants on account of the use, and contemplated use, of the ditch as an outlet for sanitary sewage. There is some conflict in the evidence on this question, but the trial court considered and weighed this evidence, and found against appellants on this question, and there is evidence to sustain the finding. We cannot reverse the judgment on the evidence.

Judgment affirmed.

Adams, J., not participating.

NOTE.—Reported in 98 N. E. 77. See, also, under (1) 38 Cyc. 1990; (3) 22 Cyc. 769; (4) 3 Cyc. 360. As to injunction and abatement in a case based on what must prove a nuisance, see 118 Am. St. 878.

BUTCHER v. GREENE.

[No. 7,647. Filed June 18, 1912.]

1. MINES AND MINERALS.—*Gas and Oil Lease.—Construction.—Forfeiture.*—The provision of a gas and oil lease that, in the event no well is completed by a specified date, the grant shall be null and void unless a monthly rental shall be paid for each month thereafter that such completion is delayed, is not a covenant entitling the lessor to recover the rent if no well is completed, but is a condition, which works a forfeiture of the lease in the event of lessee's failure to either complete a well or pay the rent. pp. 693, 695.
2. MINES AND MINERALS.—*Gas and Oil Lease.—Action.—Complaint.—General and Specific Allegations.*—In an action to recover rent alleged to be due under a gas and oil lease, a general allegation of the complaint that defendant took possession under the lease is controlled by specific allegations showing that although the contract was executed for the purpose of exploring for oil and gas and of erecting and maintaining buildings and structures for such purposes, defendant had failed to drill any well or wells, and from which it appeared that he had neither erected any structures or buildings nor moved any drilling machinery or implements onto the premises. p. 694.

From Adams Circuit Court; *James T. Merryman*, Judge.

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Action by Samuel A. M. Butcher against Hamer J. Greene. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

S. A. M. Butcher and Clark J. Lutz, for appellant.

Peterson & Moran, for appellee.

ADAMS, P. J.—This appeal involves the construction of a written agreement, and the question for determination is whether the contract sued on is a lease or an option.

1. The contract, omitting the immaterial parts, is as follows:

“This indenture, made this 26th day of May, 1903, by and between S. A. M. Butcher of Adams County, in the State of Indiana, party of the first part, and Hamer J. Greene, party of the second part, witnesseth: That in consideration of the sum of Ten Dollars in cash, lawful money of the United States, this day in hand paid by the said party of the second part to the said party of the first part, the receipt whereof is hereby acknowledged, the said S. A. M. Butcher, party of the first part, hereby grants unto said party of the second part all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of operating and drilling for oil and gas, and to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of all oil or gas taken from said premises; excepting and reserving, however, to the first party the one sixth part of all oil produced and saved from said premises, to be delivered in the pipe lines to which said second party may connect his wells, viz: All that certain tract of land * * * containing sixteen acres, more or less. To have and to hold the above premises for and during the term of five years from this date, and as much longer as oil or gas is found or produced thereon, or a rental paid according to the terms of this lease on the following conditions: * * * In case no well is completed by August 1st, 1903 from this date, this grant shall become null and void, unless second party shall pay to said first party a rental at the rate of five dollars for each month thereafter such completion is delayed, for the term of years above men-

tioned, to be paid at the end of each month. Second party agrees to drill one additional well after the completion of the first at intervals of six months, one well to be completed in six months after the time of the completion of the first, or forfeit the lease, as to the undrilled portion. Each well to hold eight acres, or to pay the rental as above stated, at the option of the first party. It is further hereby expressly agreed between all the parties hereto that said party of the second part shall have the right to hold said lease for the term above mentioned, if said rental is promptly paid when due; and the said sum of Ten Dollars this day received by the said first party from the said party of the second part, is the consideration for the right of the party of the second part to pay said rental and hold said lease during said term or until said wells as above provided are completed.”

It is averred in the complaint that the defendant, on May 26, 1903, took possession of said real estate by virtue of and under said lease, and has ever since had, and now

2. has the possession of the same; that defendant wholly failed to drill a well on the real estate described prior to August 1, 1903, and has ever since failed to drill any well or wells on the premises, all without fault of plaintiff; that on October —, 1903, appellee paid appellant the instalments of rent for the months of August and September of said year in the sum of \$10, and that no other rent has been paid by virtue of said lease, or under the same, although demand has been made from time to time, and payment refused; that by reason of the failure of appellee to drill wells at the time agreed on, and by reason of the failure to pay rental as provided, there is due plaintiff the sum of \$400, for which he prays judgment.

Appellee demurred to the complaint for want of sufficient facts, which demurrer was sustained by the court, and appellant electing to abide by his complaint and exception to the ruling of the court in sustaining the demurrer thereto, final judgment was rendered against appellant that he take nothing by his complaint, and that appellee recover his costs.

While it is averred that appellee took possession of the real estate by virtue of the lease, and is still in possession of the same, it affirmatively appears that the contract was executed for the purpose of exploring for oil and gas, and of erecting and maintaining buildings and structures, with the right to enter at all times for such purposes. It is not shown that the contract was recorded, and there is no averment that appellee ever erected any structures or buildings, or ever moved any machinery or implements used for drilling for oil and gas, on said premises, but it is averred that appellee wholly failed to drill any well or wells, and that he availed himself of the option provided for in the event of failure to drill, by paying the rental stipulated for the months of August and September, 1903. These specific averments must be held to control the general averment of possession.

It will be noted that the instrument sued on imposes no obligation on appellee to complete a well prior to August 1, 1903, and there is no covenant on the part of appellee

1. to pay rent. The agreement simply provided that appellee was either to construct the wells or to pay rental, and failure to do either would work a forfeiture.

A similar contract was construed in *Glasgow v. Chartiers Oil Co.* (1892), 152 Pa. St. 48, 25 Atl. 232, wherein the contract was denominated a lease, but which the court held to be a demise of the oil and gas under the grantor's land, and the right to go on the land and operate for the purpose of exploring for oil and gas. In that case, the lease was granted for five years, and as much longer as oil and gas should be found in paying quantities. The grant was on a consideration of \$100 and a royalty of one-eighth part of the oil produced. It was provided that the lease should become null and void, unless a well should be completed within one month from the date thereof, unless the lessee should pay \$100 monthly in advance for each additional month. The

court held that there was no express covenant by the lessee, and the penalty for inaction was fixed in the loss of his rights under the agreement; that forfeiture might be prevented by paying the rental stipulated, and the right of forfeiture postponed one month, and this might be continued until the end of five years; but if the lessee put down no well and paid no rental in lieu thereof, the lessor might assert a forfeiture at the end of the first month. Payment was the means provided in the contract whereby the exercise of the right of the lessor to assert a forfeiture could be postponed. If the lessee did not wish to postpone the exercise of such right, he had only to refrain from making payment. See, also, *Ohio Oil Co. v. Detamore* (1905), 165 Ind. 243, 23 N. E. 906.

Improvident and unfair as this contract may appear, no fraud is alleged or relied on, and the question presented to us is one of construction only. We think the words used import a condition and not a covenant.

Substantially the same contract was construed in the case of *Brooks v. Kunkle* (1900), 24 Ind. App. 624, 57 N. E. 260, wherein this court said: "There was no absolute requirement that the party of the second part should pay any rent, but the grant was to be void unless rent were paid. The instrument is susceptible of being construed as an expression of a rational and lawful agreement. We must construe it as expressed, attributing to the language its ordinary meaning; and we cannot construct a different contract by injecting additional words not implied in the terms employed by the parties, or by substituting meanings merely conjectured by us to be more reasonable than those expressed."

A reversal of the judgment in this case would require the overruling of *Brooks v. Kunkle*, *supra*, and this we are unwilling to do. The case last cited has been followed and approved in *United States v. Comet Oil, etc., Co.* (1911), 187

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Fed. 674, 683, and we think it is a correct expression of the law as applied to the facts stated in the complaint before us.

The judgment is affirmed.

NOTE.—Reported in 98 N. E. 876. See, also, under (1) 27 Cyc. 735; (2) 31 Cyc. 85. As to a lease on condition, or the enjoyment of which depends on a contingency, see 42 Am. Dec. 131. As to forfeiture by tenant for breach of conditions, see 26 Am. St. 911. As to covenants in mining leases for the diligent prosecution of the work, see 2 Ann. Cas. 446; 20 Ann. Cas. 1165.

ATLAS ENGINE WORKS ET AL. v. MINNEHAHA
NATIONAL BANK.

[No. 7,620. Filed April 18, 1912.]

From Superior Court of Marion County (79,188); *Pliny W. Bartholomew*, Judge.

Action by the Minnehaha National Bank against the Atlas Engine Works and another. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

William J. Henley, Frederick E. Matson and Edward E. Gates, for appellants.

Gavin, Gavin & Davis, for appellee.

MYERS, J.—In all legal respects this case is the same as the case of *Atlas Engine Works v. First Nat. Bank, etc.* (1912), *ante*, 549. 97 N. E. 952. On the authority of that case the judgment in this case is affirmed.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD
COMPANY v. MALOTT ET AL.

[No. 7,661. Filed May 8, 1912.]

From Lawrence Circuit Court; *William E. Clark*, Special Judge.

Action by Claude G. Malott and another against the Baltimore and Ohio Southwestern Railroad Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed*.

W. R. Gardiner, C. K. Tharp, C. G. Gardiner and Edward Barton, for appellant.

Brooks & Brooks, John H. Edwards, Barger & Hicks and Otto Gresham, for appellees.

Baltimore, etc., R. Co. v. Huddleston—50 Ind. App. 698.

IBACH, P. J.—This was an action to recover damages from appellant for the destruction by fire of a stock of mercantile goods owned by appellees Claude G. and Noble Malott. The theory of the complaint was that the negligence of appellant permitted large sparks, cinders and coals to be emitted from its engine, and set fire to a pork house in Tunnelton, Indiana, from which it spread to the Knights of Pythias building, in which appellees' general store was located. A damage suit for the destruction of the Knights of Pythias building was considered by this court in the case of *Baltimore, etc., R. Co. v. Reed* (1912), *ante*, 220, 98 N. E. 141.

It is argued that the evidence is insufficient to sustain the verdict, and that the court erred in giving and refusing to give certain instructions. The propositions raised have been decided practically against appellant in the case of *Baltimore, etc., R. Co. v. Reed, supra*. What was said in the opinion in that case concerning the sufficiency of the evidence, which was substantially the same in the two cases, decides that the verdict in the present case is sustained by the evidence. Somewhat different objections are presented to some of the instructions, although many of the points raised in argument on the instructions are the same as in the former case. On consideration of the instructions as a whole, we are convinced that those given state the law of the case fully and correctly and that those refused were rightly refused.

On the authority of *Baltimore, etc., R. Co. v. Reed, supra*, the judgment is affirmed.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD
COMPANY v. HUDDLESTON, SURVIVING
PARTNER, ET AL.

[No. 7,662. Filed May 15, 1912.]

From Monroe Circuit Court; John C. Robinson, Judge.

Action by William H. Huddleston, as the surviving partner of the partnership of Wilcox & Huddleston, and The Home Insurance Company of New York against the Baltimore and Ohio Southwestern Railroad Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed*.

W. R. Gardiner, C. K. Tharp, C. G. Gardiner and Edward Barton, for appellant.

J. H. Edwards, Brooks & Brooks, for appellees.

ADAMS, J.—In this case, the pleadings, the evidence and the assignment of errors are the same, and the instructions given and

Atlas Engine Works v. First Nat. Bank—50 Ind. App. 699.

refused are substantially the same, as this court considered in the case of *Baltimore, etc., R. Co. v. Reed* (1912), *ante*, 220, 98 N. E. 141.

On the authority of that case, the judgment in this case is affirmed.

ATLAS ENGINE WORKS ET AL. v. FIRST NATIONAL
BANK OF SEYMOUR.

[No. 7,557. Filed March 14, 1912. Rehearing denied May 31, 1912.]

From Superior Court of Marion County (77,995); *James M. Leathers*, Judge.

Action by the First National Bank of Seymour, Indiana, against the Atlas Engine Works and another. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

Neuman, Northrup, Levinson & Baker, Chester E. Cleveland and *Edmund B. Walker*, for appellants.

Charles F. Remy and *James M. Berryhill*, for appellee.

LAIRY, J.—This is an appeal from a judgment of the Marion Circuit Court, rendered in favor of appellee on a note for \$250, executed by the Atlas Engine Works and H. H. Hanna. The same answer and cross-complaint were filed in this case as were filed in the case of *Atlas Engine Works v. First Nat. Bank, etc.* (1912), *ante*, 549, 97 N. E. 952. Demurrers were sustained to the answer and cross-complaint in this case, and appellants refusing to plead further, judgment was rendered in favor of appellee. The same questions being presented in this case that were presented in the case above cited, the judgment of the lower court is affirmed, and the reasons for the decision appear in the opinion rendered in that cause.

Judgment affirmed.

ATLAS ENGINE WORKS ET AL. v. FIRST NATIONAL
BANK OF SEYMOUR.

[No. 7,655. Filed April 16, 1912. Rehearing denied May 31, 1912.]

From Superior Court of Marion County (79,730); *James M. Leathers*, Judge.

Action by the First National Bank of Seymour, Indiana, against the Atlas Engine Works and another. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

Atlas Engine Works v. First Nat. Bank—50 Ind. App. 699.

Neuman, Northrup, Lerinson & Baker, Chester E. Cleveland and Edmund B. Walker, for appellants.

Charles F. Remy and James M. Berryhill, for appellee.

LAIRY, J.—This action was brought by appellee in the Superior Court of Marion County against appellants to recover on a promissory note for \$750, executed by the Atlas Engine Works and H. H. Hanna. The complaint was in two paragraphs. Appellants filed a joint and several answer, to which a demurrer was sustained, and the Atlas Engine Works filed a counterclaim, to which a demurrer was also sustained. Appellants refused to amend or plead further, and judgment was rendered for appellee, from which judgment this appeal is taken.

The errors relied on for reversal call in question the correctness of the rulings of the trial court in sustaining the demurrers to these pleadings, and the same questions of law are presented as were decided in the case of *Atlas Engine Works v. First Nat. Bank, etc.* (1912), *ante*, 549, 97 N. E. 952. The pleadings in the case under consideration are the same as those ruled on in the case just cited, and the reasons for affirming the judgment of the lower court may be found in that opinion.

Judgment affirmed.

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[NOTE.—The citation *Jennings v. South Whitley Hoop Co.*, 241, 248 (2), indicates that the case begins on page 241, the point cited is on page 248, and that such point is numbered 2 in the margin.—REPORTER.]

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Jennings v. South Whitley Hoop Co., 241, 248 (2).

2. *Establishment.*—Where an agreement is relied on as an accord and satisfaction, the agreement and its execution must be established as a question of fact like any other agreement.

Jennings v. South Whitley Hoop Co., 241, 250 (7).

3. *Establishment.—Authority of Attorney.*—Where defendant, operating a wholesale business in one city under the name of C. Company and in another under the name of L. Company, had purchased supplies from plaintiff with names of the two companies, in an action to recover a balance due, evidence showing that plaintiff had placed in the hands of an attorney an account against the C. Company, that the attorney had no knowledge of the L. Company nor of any transactions had between it and the plaintiff, and that defendant gave to such attorney his check for the amount of the claim against the C. Company, with a statement attached thereto that it was to be accepted in full payment of all obligations of the plaintiff against the C. Company and the L. Company, and that the attorney detached the statement and cashed the check, was insufficient to establish an accord and satisfaction of the claim sued on in the absence of evidence showing special authority in the attorney.

Jennings v. South Whitley Hoop Co., 241, 248 (3).

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Wills v. Mooney-Mueller Drug Co., 193, 196 (2).

2. *Action.—Monthly Statement of Account.*—A monthly statement of account, showing charges, credits and the balance due, is sufficient to constitute an account within the meaning of §368 Burns 1908, §362 R. S. 1881.

Wills v. Mooney-Mueller Drug Co., 193, 196 (1).

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I. DECISIONS REVIEWABLE.

1. *Objections to Introduction of Evidence.*—Only such reasons as are assigned in the trial court as objections to the introduction of evidence will be considered on appeal.
 Taylor v. Campbell, 515, 519 (1).
2. *Moot Questions.*—On appeal the court will not express an opinion on a question suggested by counsel, but not presented for decision in the case.
 Lortz v. Davis, 337, 346 (4).
3. *Review.—Instructions.—Contradiction.*—The giving of an instruction announcing two standards of duty for the measurement of defendant's conduct in determining whether he was negligent, is prejudicial error.
 Rump v. Woods, 347, 355 (8).
4. *Final Judgment.—Order Granting New Trial.*—An order granting a new trial under the provisions of §589 Burns 1908, §562 R. S. 1881, is a final judgment within the meaning of §671 Burns 1908, §632 R. S. 1881, from which an appeal will lie.
 Jones v. Kolman, 158, 160 (3).
5. *Pleading.—Complaint.—Answer.*—It is necessary for the appellate court to determine the sufficiency of a complaint to withstand a demurrer for want of facts before the judgment appealed from can be set aside because of an insufficient answer.
 Goldsmith v. First National Bank, 11, 16 (4).
6. *Motion for Directed Verdict.—Manner of Presenting Question.*—No question is presented by an independent assignment that the court erred in overruling a motion for directed verdict at the close of the evidence, but the alleged error should be included in the motion for a new trial.
 Cleveland, etc., R. Co. v. Federle, 147, 150 (1).
7. *Reserved Question of Law.—Perfecting Appeal Under General Provisions of Practice Act.*—The mere fact of giving notice to the court of an intention to perfect an appeal presenting a re-

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served question of law under §669 Burns 1908, §630 R. S. 1881, does not prevent appellant from afterwards perfecting the appeal under the general provisions of the practice act.

Curry v. Plessinger, 166, 176 (9).

8. *Trial.—Misconduct of Jury.—Record.*—To make objections to the misconduct of the jury available, the record must show that neither appellant nor his counsel had knowledge of the alleged misconduct before the jury returned its verdict; or, in case they had such knowledge, a sufficient excuse for their failure to interpose seasonable objections to such misconduct must be shown.

New v. Jackson, 120, 131 (10).

9. *Review.—Decision of Court.—Insufficient Evidence.*—In a suit to restrain the interference with rights under a license to cut timber, although the defendant acquired his interest in the land with full knowledge of the license and the rights of plaintiffs thereunder, the decision of the court in favor of plaintiffs was not supported by the evidence, where it was not shown that defendant's grantor, who was the grantee of the licensor, had neither actual nor constructive notice of the existence of plaintiff's claim to the timber.

Young v. Waggoner, 202, 206 (4).

II. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) ISSUES AND QUESTIONS IN LOWER COURT.

10. *Instructions.—Failure to Save Exceptions.*—Where appellant fails to save an exception to an instruction at the time it is given, the giving of such instruction is not a cause for a new trial and no question can be presented thereon for review on appeal.

Cronin v. Keesling, 260, 262 (2).

11. *Evidence. — Limiting Application. — Presenting Question.* — Where evidence was properly admitted for one purpose no question is presented as to its competency for another purpose, where appellant failed to tender an instruction limiting its application.

Cleveland, etc., R. Co. v. Federle, 147, 157 (13).

(B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

12. *Joint Objection to Instructions.—Effect.*—To make a joint objection to instructions available, it must appear that all the instructions named are incorrect. *Steele v. Spaulhurst*, 564, 565 (3).

13. *Insufficiency of Evidence.—How Question Presented.*—In cases triable by jury the question as to the sufficiency of the evidence can be presented on appeal only by assigning as one of the causes for a new trial that the verdict or decision is not sustained by sufficient evidence, and then assigning as error the action of the trial court in overruling the motion for a new trial.

Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co., 59, 71 (7).

(C) MOTIONS FOR NEW TRIAL.

14. *Review.*—When it appears on appeal that the ends of justice will best be served by granting a new trial, the court will grant a new trial rather than to render judgment in favor of the appellant.

Curry v. Plessinger, 166, 177 (10).

15. *Presenting Question for Review.—Interrogatory Not Sustained by Sufficient Evidence.*—No question is presented by a motion for a new trial on the ground that a certain interrogatory is not sustained by sufficient evidence.

American Surety Co. v. State, ex rel., 475, 492 (19).

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16. *Presenting Ground for Review in Trial Court.*—No question is presented by a motion for a new trial based on §585, subd. 5, Burns 1908, §559 R. S. 1881, alleging error in assessing the amount of recovery, but failing to state in what respect the jury erred.
Boggs v. Toney, 289, 290 (2).
17. *Instructions.—Exceptions in Gross.*—Where instructions are excepted to in gross, or the ground of the motion for new trial alleging error in giving or refusing instructions is in gross, and one of said instructions is sound, the error so relied upon in giving or refusing the same will not be available on appeal.
Steele v. Michigan Buggy Co., 635, 640 (8).

III. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) MATTERS TO BE SHOWN BY RECORD.

18. *Matters Not Apparent of Record.—Instructions.*—Where an instruction complained of is not in the record it will not be noticed on appeal.
Cronin v. Keesling, 260, 261 (1).
19. *Instructions.—How Brought Into Record.*—Where instructions are in writing, they should be brought into the record either by filing with the clerk as provided by statute, or by filing a bill of exceptions containing the same, and if they were given orally they should be brought into the record by a bill of exceptions, or by having them reduced to writing, signed by the judge and filed with the clerk before the close of the term, as provided by §561 Burns 1908, Acts 1907 p. 652. *Cronin v. Keesling*, 260, 262 (2).

(B) NECESSITY OF BILL OF EXCEPTIONS.

20. *Depositions.—Motion to Strike Out.—Record.—Bill of Exceptions.*—A motion to strike out the answers to certain questions in a deposition, not made in the manner required by §662 Burns 1908, Acts 1903 p. 338, does not become a part of the record under the provisions of §663 Burns 1908, Acts 1903 p. 338, and, unless brought in by a bill of exceptions, no question as to the court's ruling thereon can be presented.
Vandalia R. Co. v. Baker, 184, 189 (8).

IV. ASSIGNMENT OF ERRORS.

21. *Waiver.*—An assignment of error is waived by failing to argue it or to cite authorities in its support.
Smith v. Hunt, 592, 594 (1).
22. *Overruling Motion for Continuance.*—The overruling of a motion for a continuance is cause for a new trial, but cannot be made an independent assignment of error, and when so assigned no question is presented.
Cronin v. Logansport Daily Reporter Co., 263 (1).
23. *Insufficiency of Evidence.—Statute.*—Under §698 Burns 1908, Acts 1903 p. 338, a direct assignment of error questioning the sufficiency of the evidence to sustain the verdict is unavailing, that section being applicable only to cases not triable by jury.
Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co., 59, 71 (6).
24. *Dismissal of Appeal from Justice of the Peace.*—Error in sustaining a motion to dismiss an appeal from a justice of the peace is not an "error of law occurring at the trial" and can only be presented on appeal by an independent assignment of error.
Hughes v. Chicago, etc., R. Co., 278, 279 (1).

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25. *Rulings on Motion to Strike Out Parts of Deposition.*—Rulings on a motion to strike out parts of a deposition cannot be considered as independent assignments of errors on appeal, but are proper grounds for new trial.
Steele v. Michigan Buggy Co., 635, 637 (1).
26. *Failure to Carry Demurrer to Answer Back to Complaint.*—*Question Presented.*—An assignment of error in the failure of the trial court to carry back a demurrer to a paragraph of answer and sustain it to the complaint presents the question of the sufficiency of the complaint on appeal.
Walker v. Bement, 645, 651 (1).
27. *Ruling on Motion.*—*Motion Not in Writing.*—*Error Not Available.*—Assignments of errors in overruling a motion for new trial, based on rulings of the trial court on a motion to strike out parts of a deposition, are not available on appeal where such motion to strike out was not in writing.
Steele v. Michigan Buggy Co., 635, 638 (3).
28. *Reservation of Grounds.*—*Exceptions in Gross.*—The rule in regard to exceptions in gross has been somewhat relaxed from its former strictness, but not to the extent of abrogating the rule that, where there is a joint exception to several distinct acts or conclusions of the court upon which error may be predicated, clearly shown by the record, an assignment of error as to one of such acts presents no question on appeal.
Harting v. Vandalia Coal Co., 98, 100 (2).
29. *Assignment of Error in Giving Peremptory Instructions.*—*Briefs.*—*Sufficiency.*—The rule requiring appellant to set out in his brief a condensed recital of the evidence in narrative form, where the sufficiency of the evidence to sustain the verdict is questioned, does not apply where he seeks a reversal on the ground that it was error to direct the verdict, in which case he need only set out enough of the evidence to show that there is some evidence tending to prove every material averment of his pleading.
Bennett v. Chicago, etc., R. Co., 264, 266 (3).
30. *Waiver.*—*Effect on Other Assignment Presenting Same Question.*—Appellant's waiver of error in the court's ruling on demurrer to a paragraph of complaint proceeding on appellant's right to a lien on a building erected on appellee's premises, did not operate as a waiver of his right to present the same question by assignment of error in overruling his motion to modify the judgment and decree so as to give him a lien on the building and an order for the sale thereof to satisfy the lien.
Toner v. Whybrew, 387, 390 (2).
31. *Reservation of Grounds.*—*Joint Exceptions to Several Acts.*—*Error Assigned Only on One Act.*—Where, for the purpose of reconsidering its ruling on a demurrer to the complaint, the trial court set aside the submission of a cause to the jury, reconsidered its ruling on such demurrer and sustained the same, to all of which acts the record shows a joint exception, the setting aside of the submission and the further consideration of the demurrer were but preliminary steps to the ruling on the demurrer, which, if erroneous, was the one act harmful to the plaintiff, so that an assignment of error based only upon the ruling on the demurrer properly presented the question of the sufficiency of the complaint on appeal.
Harting v. Vandalia Coal Co., 98, 99 (1), 101 (1).

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32. *Waiver of Error.*—Error assigned, but not urged in appellant's brief is waived. *Toner v. Whybrew*, 387 390 (1).
33. *Must Set Out Errors Relied on.*—Errors assigned and argued, but not set out in appellant's brief, are considered waived. *Jeffersonville School Tp. v. School City, etc.*, 178, 181 (1).
34. *Motion for New Trial.—Waiver of Error.*—An assignment of error in overruling a motion for a new trial is waived, unless the motion or its substance is set out in appellant's brief. *Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co.*, 59, 62 (2).
35. *Failure to Set Out Instruction.—Waiver of Error.*—Error in the giving of an instruction is waived where appellant fails to set out the instruction in his brief or to point out the alleged error. *Boggs v. Toney*, 289, 291 (4).
36. *Attacking Sufficiency of Complaint.*—Where there is no assignment of error which presents the question of the sufficiency of a complaint, attacking its sufficiency in appellant's brief is of no avail. *New v. Jackson*, 120, 123 (1).
37. *Instructions.—Waiver.*—Error predicated on the refusal of an instruction is waived where such instruction is not set out in appellant's brief, and no ground of error is pointed out or suggested. *St. Clair v. Princeton Coal, etc., Co.*, 269, 277 (3).
38. *Time for Filing.—Dismissal.*—Where appellant procured an extension of time for filing briefs to March 3, the filing of such briefs after March 2 was not in time, and authorized a dismissal of the appeal. *Myers v. Winona, etc., R. Co.*, 258, 260 (3).
39. *Presenting Question of Erroneous Instructions.*—Only such instructions as are pointed out as objectionable in the points and authorities in appellant's brief will be considered on appeal. *New v. Jackson*, 120, 123 (2).
40. *Failure to Comply With Court Rule.—Waiver of Error.*—Where appellants' brief does not set out so much of the record as fully presents the errors relied on, with reference to the page and line of the transcript, as required by rule twenty-two, such errors are waived. *Thompson v. Thompson*, 95, 96 (1).
41. *Statement That Instruction is "Fatally Erroneous".—Objection Not Available.*—Where the only ground of objection to an instruction stated by appellant in his points and authorities is that it was "fatally erroneous," the objection is too indefinite and uncertain and therefore not available. *New v. Jackson*, 120, 127 (5).
42. *Waiver of Error.*—Alleged error in overruling a motion to reinstate a cause is waived by failing to set out the motion or its substance in appellant's brief and failing to state any point or proposition of law thereon or to cite any authority in support thereof. *Cronin v. Logansport Daily Reporter Co.*, 263 (2).
43. *Failure of Appellant to Comply With Rules of Court.—Right of Appellee.*—Where the appellant's brief does not substantially comply with the rules of court, the appellee is not required to supply the omissions of appellant, nor to submit a brief on the merits, but he has a right to assume that the rules will be enforced. *Webster v. Bligh*, 56, 57 (1), 58 (1).
44. *Statement of Evidence.—Defective Statement Cured by Appellee's Brief.*—Although a statement of the evidence in appellant's brief is an insufficient compliance with rule twenty-two to present

APPEAL—Continued.

any question on the evidence for review, the question is presented where such defective statement is remedied by appellee's brief.

Hughes v. State, ex rel., 617, 619 (1).

45. *Motion for New Trial*.—Where the overruling of a motion for a new trial is assigned as error, appellant's brief should contain so much of the record as shows that such a motion was filed, and that the same was overruled by the court and an exception saved to such ruling, and should also contain a copy of the motion, or its substance, with reference to the pages and lines of the transcript where the entry may be found.

Thompson v. Thompson, 95, 97 (2).

46. *Statement of Evidence.—Failure to Comply with Rules of Court*.—Where appellant made no effort to set out the evidence in his brief in the manner required by clause five of rule twenty-two of the court, but under the head of "The Facts" gave a history of the case from its inception, made up of the conclusions of counsel as to what the evidence was, together with comments and argument, no question on the evidence was thereby presented.

Webster v. Bligh, 56, 59 (4).

47. *Matters Not Argued*.—Where, under the head of "Points and Authorities" in appellant's brief, the propositions of law stated and the authorities cited in support of appellant's contention that the trial court erred in sustaining a demurrer to certain paragraphs of answer are of little aid to the court in determining the question, and the matters arising on such demurrer are not argued, the court will not pass on the sufficiency of such paragraphs of answer.

Walker v. Bement, 645, 652 (5).

48. *Statement of Evidence.—Sufficiency*.—Where appellant set out in his brief certain questions and answers from the testimony of two witnesses, and a statement of what he deemed to be the substance of the testimony of other witnesses, including conclusions and argumentative statements, and omitted the names of many witnesses, there was no such compliance with the rule, requiring appellant's brief to contain a condensed recital of the evidence in narrative form, as to raise any question upon the sufficiency of the evidence to sustain the decision of the court.

Jeffersonville School Tp. v. School City, etc., 178, 182 (4).

VI. ABATEMENT OR DISMISSAL

49. *Action for Personal Injuries.—Death of Party.—Abatement*.—Under the provisions of §283 Burns 1908, §282 R. S. 1881, the appeal, in an action for personal injuries, abates on the death of the plaintiff.

Hudson v. Indiana Union Traction Co., 292 (1).

VII. REVIEW.**(A) PRESUMPTIONS.**

50. On appeal, the presumption is in favor of the proceedings of the trial court, and the burden is on the party alleging error to affirmatively point it out.

March v. March, 293, 295 (1).

51. Where it affirmatively appears that any error disclosed by the record was not harmful to appellant, every presumption will be indulged in favor of the judgment below.

St. Clair v. Princeton Coal, etc., Co., 269, 278 (5).

52. *Assignment of Error in Giving Peremptory Instructions.—Briefs*.—Where appellant seeks a reversal on the ground of al-

APPEAL—Continued.

leged error in directing a verdict, it will be presumed that he has set forth in his brief all of the evidence in his favor.

Bennett v. Chicago, etc., R. Co., 264, 267 (4).

53. *Special Findings and Conclusions of Law.—Failure to Except to Findings.*—Where appellant excepted to conclusions of law, but failed to question the correctness of the findings of facts, it will be presumed that the facts found are supported by the evidence.

Barker v. McClelland, 296, 301 (1).

54. *Judgment.—Burden of Showing Error.*—On appeal every presumption is indulged in favor of the correctness of the judgment of the trial court, and the appellant has the burden of showing error therein, which he must do in the manner prescribed by the rules of the court.

Webster v. Bligh, 56, 58 (2).

55. *Sufficiency of Complaint.*—Where appellant challenges the sufficiency of the complaint for want of facts, but fails to point out any omitted fact essential to a recovery, the complaint will be presumed to contain facts sufficient to bar another action for the same cause.

March v. March, 293, 295 (3).

56. *Trial.—Misconduct.—Presumptions as to Regularity.*—Where alleged error is presented relating to the misconduct of the jury, and it appears from the record that such misconduct occurred after the jury had retired to consider its verdict, and that on being advised of the same the court called the jury into the court room and instructed it as to such misconduct, it will be presumed, in the absence of a showing to the contrary, that the proceedings of the trial court were regular and that both parties to the action were present either in person or by some of their attorneys when such action was taken.

New v. Jackson, 120, 130 (9).

57. *Trial.—General Verdict.—Interrogatories.*—In an action to recover money advanced on a draft drawn on defendant by his agents for the price of a car of fruit purchased pursuant to a telegram from defendant reading "Buy car San Diego extra choice lemons, \$2.18, of new crop," the said advancement of money having been made by plaintiff on the written guarantee of defendant to pay all drafts drawn on him by his agents for cars of fruit that they are authorized to purchase for spot cash, evidence was admissible within the issues to show that the terms of said purchase were indicated by letters and telegrams other than that set out, and for the purpose of reconciling a general verdict for plaintiff with answers to interrogatories not showing the terms of the purchase to be for cash, it will be presumed that such evidence was introduced.

Goldsmith v. First National Bank, 11, 17 (6).

(B) DISCRETION OF LOWER COURT.

58. *Trial.—Order of Proof.*—The order of the admission of evidence is ordinarily a matter within the sound discretion of the trial court, and will furnish no ground for reversal unless there has been a clear abuse of such discretion.

American Surety Co. v. State, ex rel., 475, 488 (9).

(C) VERDICT AND FINDINGS.

59. *Verdict.*—Where there is some evidence to support the verdict, it will not be disturbed on appeal.

Vandalia R. Co. v. Baker, 184, 192 (10).

60. *Evidence.*—If a finding of the trial court is supported by some evidence, although conflicting, it cannot be disturbed on appeal.

Geiger v. Town of Churubusco, 685, 692 (5).

APPEAL—Continued.

61. *Conclusiveness*.—Where there is some evidence to support the findings of the trial court, they will not be disturbed on appeal.
Jennings v. South Whitley Hoop Co., 241, 248 (1).
62. *Preponderance of Evidence*.—The findings of the trial court will not be disturbed on appeal because of any apparent preponderance of the evidence.
Hollingsworth v. Hollingsworth, 137, 140 (3).
63. *Answers to Interrogatories*.—Where there is no irreconcilable conflict between the answers to interrogatories and the general verdict, the verdict will stand.
Federal Cement Tile Co. v. Korff, 608, 616 (11).
64. *Evidence*.—Where there was some evidence to warrant a jury in finding that there was no contributory negligence, a verdict for plaintiff will not be disturbed.
Chicago, etc., R. Co. v. Hamerick, 425, 447 (20).
65. *Sufficiency of Evidence*.—A cause will not be reversed for insufficiency of the evidence to sustain the verdict, where there was some evidence to warrant the finding of the jury.
American Surety Co. v. State, ex rel., 475, 492 (20).
66. *Special Findings—Evidentiary Facts*.—Evidentiary facts in special findings furnish no grounds upon which the court can predicate its conclusions of law, and will be disregarded on appeal.
Barrett v. Sipp, 304, 314 (11).
67. *Sufficiency of the Evidence*.—The court will not weigh the evidence on appeal, and where there is evidence tending to prove all the facts essential to a recovery, the verdict will not be disturbed for insufficiency of the evidence.
Chicago, etc., R. Co. v. Hamerick, 425, 440 (10).
68. *Sufficiency of Evidence*.—Where there was evidence supporting the verdict on all questions material and necessary to a recovery by appellee, the verdict will not be disturbed on the question of the sufficiency of the evidence.
New v. Jackson, 120, 132 (12).
69. *Answers to Interrogatories*.—Where the verdict and the answers to the interrogatories were not without some evidence for their support, a cause will not be reversed on the grounds that the verdict is not sustained by sufficient evidence and that it is contrary to law. *St. Clair v. Princeton Coal, etc., Co.*, 269, 277 (4).
70. *Rulings on Demurrers—Finding and Judgment Not Affected*.—Alleged error in overruling the demurrer to a paragraph of reply will be disregarded where the finding and judgment is not dependent upon any issue tendered by the reply or the answer to which it was addressed.
March v. March, 293, 295 (4).
71. *Evidence*.—In order that a verdict may be upheld, it must appear that every material allegation of the complaint, put in issue by the pleadings, is supported by the evidence in the record, unless the fact so in issue is one of which the trial court could take judicial notice.
Henry v. Epstein, 660, 664 (1).
72. *Overruling Demurrer to Bad Paragraph of Complaint*.—Where there was some evidence to support the theory of a bad paragraph of complaint, so that it does not clearly appear that the verdict rests upon a paragraph that was sufficient, the overruling of a demurrer to such bad paragraph is reversible error.
Chicago, etc., R. Co. v. Chaney, 106, 113 (7).

APPEAL—Continued.

73. *Answers to Interrogatories.*—A general verdict finds every issuable fact in favor of the prevailing party, and on appeal the court cannot, in passing on a motion for judgment on the answers to interrogatories, consider the evidence, but must look solely to the general verdict, the interrogatories and answers, and to the facts provable under the issues.

Chicago, etc., R. Co. v. Hamerick, 425, 439 (7).

74. *Sufficiency of Evidence Must be Determined from Record.*—Where error is assigned in overruling a motion for a new trial on the insufficiency of the evidence to sustain a verdict, the question whether there was evidence to warrant the jury's finding must be determined from the record alone, and the question of what evidence was admissible under the issues cannot be considered.

Chicago, etc., R. Co. v. Hamerick, 425, 444 (15).

75. *Sufficiency of Evidence.*—In passing on error assigned in overruling a motion for a new trial on the ground of insufficient evidence to sustain a verdict for plaintiff, in an action against a railroad company for the death of an engineer in a collision, where the evidence showed that the decedent violated the printed rules of the company in obeying a signal to proceed down the main track, instead of complying with a previous order to take the siding, the court, under the issue tendered by a complaint alleging that it was the duty of the decedent to obey such signal, must ascertain whether there was some evidence from which the jury may rightfully have found the existence of a custom to thus violate such printed rules so as to operate as an abrogation of the same.

Chicago, etc., R. Co. v. Hamerick, 425, 444 (14).

(D) HARMLESS ERROR.

76. Where it is apparent from the record that appellant was not harmed by the admission or the exclusion of certain evidence, questions presented thereon will not be considered.

Chicago, etc., R. Co. v. Hamerick, 425, 449 (25).

77. *Correct Result.*—Where the result reached is clearly right under the evidence the judgment will not be reversed on account of an erroneous instruction.

Goldsmith v. First National Bank, 11, 22 (13).

78. *Sustaining Demurrer to Answer.*—Sustaining a demurrer to an answer pleading facts which may be proved under the general denial is not reversible error.

Brown v. Marion Commercial Club, 670, 680 (7).

79. *Exclusion of Evidence.*—No available error is presented on the exclusion of evidence where the record shows that the witness afterwards answered the question excluded.

American Surety Co. v. State, ex rel., 475, 488 (10).

80. *Instructions.*—A cause will not be reversed because of an erroneous instruction, if, in view of the evidence, the error was harmless.

Vandalia R. Co. v. Baker, 184, 187 (2).

81. *Verdict.—Incomplete Instruction.*—The giving of an incomplete instruction on the measure of damages is harmless error where the size of the verdict was warranted by the facts shown.

Chicago, etc., R. Co. v. Hamerick, 425, 449 (24).

82. *Instructions.*—The inadvertent use of the word "plaintiff" instead of "plaintiff's ward" in instructions is not reversible error where it does not appear that that could or did in any way mislead the jury.

Cleveland, etc., R. Co. v. Federle, 147, 156 (8).

APPEAL—Continued.

83. *Instructions.*—The giving of an instruction which is not accurately worded is not cause for reversal where, in view of the evidence and other instructions given, the jury was not misled thereby. *Smith v. Hunt*, 592, 599 (7).
84. *Instructions.—Verdict.—Interrogatories.*—Where from the answers to interrogatories it affirmatively appears that erroneous instructions did not influence the result, such errors will be treated as harmless. *Goldsmith v. First National Bank*, 11, 20 (9).
85. *Instructions.*—The giving of an erroneous instruction, or the refusal to give one which is proper and applicable, is not reversible error where it clearly appears from the record that no harm has resulted to the complaining party.
St. Clair v. Princeton Coal, etc., Co., 269, 271 (1).
86. *Instructions.*—Where the delivery of the defendant's guaranty of payment of a draft is established by the undisputed evidence, or its delivery is admitted by him, the failure of the court to include the question of delivery of such guaranty as one of the facts to be established to entitle plaintiff to a verdict, in an action for money advanced on said draft, is not reversible error.
Goldsmith v. First National Bank, 11, 21 (11), 22 (11).
87. *Instructions.—Refusal.*—In an action for the death of a railroad engineer, where the complaint charged negligence in the giving of a signal by the operator of defendant's block system, the refusal of an instruction that if the alleged signal was given by order of the train dispatcher there could be no recovery, was harmless where the jury's answer to an interrogatory showed that the signal was not given by order of the train dispatcher.
Chicago, etc., R. Co. v. Hamerick, 425, 448 (22).
88. *Instruction as to Burden of Proof.*—Where, in an action against an interurban railroad company for personal injuries, based on the theory of the incompetency of defendant's trainmaster, the plaintiff produced sufficient affirmative proof to justify the finding that he had no knowledge of the incompetency charged, and no proof to the contrary was offered, an instruction placing the burden on defendant to prove that plaintiff knew of such incompetency, although erroneous, was harmless.
Indiana Union Traction Co. v. Pring, 586, 590 (18).
89. *Instructions.—Answers to Interrogatories.*—In an action by plaintiff to recover for the death of her husband while employed in defendant's coal mine, where the answers of the jury to interrogatories showed conclusively that decedent was guilty of negligence proximately contributing to his death, instructions were harmless which could have had no influence on the findings of the jury on the subject of contributory negligence, although the giving of such instructions would have been reversible error in the absence of such findings.
St. Clair v. Princeton Coal, etc., Co., 269, 271 (2).
90. *Instructions.*—In an action for personal injuries sustained in being thrown from a wagon while driving over a defective railroad crossing, where an examination of the testimony shows nothing that could have been considered "under the evidence" except elements of compensation for the alleged injury, and the size of the verdict indicates that nothing speculative or improper entered into it, an instruction was harmless, although perhaps technically incorrect, which called attention only to elements of actual damage to be considered, if shown by the evidence, and

APPEAL—Continued.

concluded by stating that the injured party should be awarded such damages as he was "fairly entitled to" under the evidence.

Cleveland, etc., R. Co. v. Federle, 147, 156 (9).

91. *Ruling on Demurrer for Misjoinder of Causes.*—Under the provisions of §346 Burns 1908, §341 R. S. 1881, erroneously sustaining a demurrer for misjoinder of causes of action is not cause for reversal.
Essex v. Hopkins, 316, 320 (1).

92. Under the provisions of §§407, 700 Burns 1908, §§389, 658 R. S. 1881, the judgment will not be disturbed on account of intervening error where it appears from the record that the error was harmless and that a fair trial was had and a correct conclusion reached by the trial court.
March v. March, 293, 296 (6).

93. *Refusal to Submit Interrogatories.*—The refusal to submit certain interrogatories is not prejudicial error, where in the main such interrogatories called for items of evidence, or related to collateral or immaterial matters, although some of them might have been properly submitted.

American Surety Co. v. State, ex rel., 475, 492 (18).

94. *Denying Application for Change of Venue.*—Where an application for a change of venue was erroneously denied because not filed within the time fixed by a rule of court, and the trial of the cause resulted in a mistrial, and no application for a change of venue was made after such mistrial and before a second trial of the cause, the error was harmless.

Federal Cement Tile Co. v. Korff, 608, 616 (9).

95. *Admission of Evidence.—Cumulative Evidence.*—In an action to recover for injuries to plaintiff's ward, where there was other evidence showing the ward's mental condition to be impaired as the result of his injury, and the defendant introduced no evidence whatever on the question, the admission in evidence of the probate order book showing an adjudication of the ward's mental unsoundness was merely cumulative and harmless.

Cleveland, etc., R. Co. v. Federle, 147, 158 (14).

(E) ERROR WAIVED.

96. An assignment of error is waived by failure to make any argument or to cite any authority in support thereof.

Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co., 59, 61 (1).

97. *Joint Objection to Instructions.*—Where the giving of a number of instructions was jointly assigned as cause for a new trial, the failure to point out an objection to one of such instructions on appeal is a waiver of any objection to the instructions included in the assignment.

Steele v. Spaunhurst, 564, 566 (4).

VIII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) DECISION IN GENERAL.

98. *Review.—Searching Record.*—The court will not search the record on appeal to reverse a cause, but may do so to affirm it.

March v. March, 293, 295 (2).

99. *Review.—Ruling on Objection to Admission of Evidence.*—It is not error to overrule an objection to the admission of evidence where no grounds of objection are stated.

Taylor v. Campbell, 515, 520 (3).

100. *Review.—Conclusions of Law.*—In an action to cancel a bond, where it appeared that no present liability existed thereon and that none could arise in the future, the court did not err in its

APPEAL—Continued.

conclusions of law in favor of the plaintiff and in directing a cancelation of the instrument. *Barker v. McClelland*, 296, 303 (7).

101. *Law of Case.—Pleading.*—Where the complaint in an action has been held sufficient by the Appellate Court on a former appeal that ruling whether right or wrong became the law of the case and will be applied throughout the entire proceedings.

Goldsmith v. First National Bank, 11, 14 (1), 15 (1).

102. *Review.—Law of the Case.*—Although a former decision of a case on appeal is the law of the case where the question presented on a subsequent appeal remains the same, it is not necessarily so as to new or additional questions presented on such subsequent appeal.

Indiana Union Traction Co. v. Pring, 566, 578 (4).

103. *Subsequent Trial.—Law of the Case.*—The decision of the court on appeal is the law of the case on all questions determined thereby, and where the court on appeal decided that the verification of the county treasurer's return of delinquent lands was not necessary to a valid sale of such lands for taxes, it is controlling on a subsequent trial. *Henderson v. Bivens*, 384, 385 (1).

104. *Law of Case.—Pleading.*—Where the question presented for decision on the former appeal of a cause did not require the Appellate Court to pass on the sufficiency of the complaint, then any thing which such court may have said in an attempt to decide such question will not have the effect of determining its sufficiency on a second appeal.

Goldsmith v. First National Bank, 11, 14 (2).

105. *Tendering Proper Instruction.—Waiver.*—Where plaintiff tendered on a branch of the case an instruction at the time fully supported by authority, but later superseded by the decision of the Supreme Court, and the court refused to give to the jury the instruction tendered, but gave one which, though not a positive misstatement of the law, did not fully cover the issue covered by the instruction tendered and refused, the plaintiff by his failure to tender other instructions on the same branch of the case should not be held to have waived the right to an instruction fully covering said branch.

Caughell v. Indianapolis Traction, etc., Co., 5, 9 (3).

106. *Review.—Evidence.*—In an action on a claim against an estate for services rendered the decedent, where the substance of the uncontradicted evidence shows that during the period of his last illness, and out of the presence of the claimant, decedent had said that he would rather have the claimant wait on him than anyone else, and that he would see that claimant would be paid for his services if he would stay with him, and a part of the evidence as to the amount of services rendered, and their nature, showed that the services were such as might have been rendered without any thought of or desire for compensation, the finding and judgment of the lower court against the claimant will not be reversed on the theory that the undisputed evidence shows a contract under which some services were rendered.

Hollingsworth v. Hollingsworth, 137, 139 (2).

(B) AFFIRMANCE.

107. *Review.—Merits Fairly Tried.*—A cause will not be reversed where it appears that its merits have been fairly tried and determined in the lower court.

Jeffersonville School Tp. v. School City, etc., 178, 183 (6).

APPEAL—Continued.

108. *Review.—Sufficiency of Evidence.*—A cause will not be reversed for insufficiency of the evidence to show a fact that was not essential to the recovery. *March v. March*, 293, 295 (5).
109. *Excessive Damages.*—A cause will not be reversed simply because the damages awarded are excessive, where the amount of such excess is less than one dollar.
Miller v. Citizens Building, etc., Assn., 132, 137 (7).
110. *Review.—Overruling Motion to Modify Judgment.*—The action of the lower court in overruling a motion to modify a judgment, by striking out that portion rendered on a cross-complaint which tendered issues not germane to the main action, will not be reversed, where appellant was not a party to such cross-complaint and consequently not bound by the portion of the judgment sought to be stricken out.
Bradford v. McBride, 624, 629 (3).

(C) REVERSAL

111. *Record.—Review.*—To warrant a reversal on appeal the record must affirmatively disclose error.
Cronin v. Keesling, 260, 262 (4).
112. *Review.—Disposition of Cause.*—A cause will be reversed and a new trial ordered, where, on a careful consideration of the case as disclosed by the record, the court deems that justice will be best subserved thereby.
Brown v. Marion Commercial Club, 670, 685 (13).
113. *Review.—Judgment.—Against Uncontradicted Evidence.*—Although a judgment of the lower court will not be reversed on the mere weight of testimony, a reversal will be ordered if the judgment is against the uncontradicted evidence.
Hollingsworth v. Hollingsworth, 137, 138 (1).
114. *Review.—Incomplete Instruction.—Prejudicial Effect.*—Where, in view of the evidence and the issues in the case, appellant may have been prejudiced by an instruction which was incomplete rather than erroneous, it will be cause for reversal, although it might not in every case constitute available error.
Steele v. Michigan Buggy Co., 635, 644 (15).

APPLIANCES—

Duty of master to provide safe materials and, see MASTER AND SERVANT 3.

APPLICATION OF PAYMENTS—

See PAYMENT 3-6.

ARREST OF JUDGMENT—

Motion for, properly overruled, see JUDGMENT 1.

ASSIGNMENT OF ERRORS—

See APPEAL 21-31.

ASSUMPTION OF RISK—

See MASTER AND SERVANT 22.

ATTORNEY AND CLIENT—

1. *Authority of Attorney.—Collection of Claims.—Compromise.—Rights of Client.*—Except in cases of emergency where the interest of the client may be jeopardized if action be deferred, or when specially authorized so to do, an attorney has no authority to compromise a claim placed in his hands for collection, and, where he does so, the client is at liberty to ignore the same and treat such action as a nullity.

Jennings v. South Whitley Hoop Co., 241, 249 (4).

2. *Unauthorized Compromise.—Ratification by Client.*—Where an attorney, without authority to do so, effected an alleged compromise of plaintiff's claim, the fact that plaintiff delayed bringing an action until nineteen days thereafter was not such acquiescence as would amount to a ratification of the attorney's act.

Jennings v. South Whitley Hoop Co., 241, 249 (5).

AUTHORITY—

Of attorney, see ACCORD AND SATISFACTION 3.

AUTOMOBILES—

Action for injuries from being struck by, see NEGLIGENCE 10, 15.

BAILMENT—

1. *Loan of Stock.—Obligation of Borrower.*—The mere loan of stock gives rise to no obligation on the part of the borrower except that of returning it on demand, and the right of the lender to demand money for the stock can not arise until there has been a failure to return on demand, and arises only out of the breach of such obligation.

Walker v. Bement, 645, 655 (7).

2. *Loan of Stock.—Failure to Return.—Damages.—Measure.*—Where corporate stock is loaned to another under an agreement to be returned to the owner on demand, the damages resulting from a failure to return such stock would be its market value at the time of the demand, or, in the absence of a market value, its actual value, unless a higher value could be shown between the date of demand and the time of trial, in which event the higher value would be the measure of damages.

Walker v. Bement, 645, 658 (13).

BASTARDS—

1. *Legitimation.—Manner of Acknowledgment.*—An acknowledgment of a bastard child by the father may be by words, or it may be inferred from acts and conduct.

Harness v. Harness, 364, 368 (4).

2. *Legitimation.—Effect.—Rights Under Devise to "Children".*—Under the provisions of §3001 Burns 1908, §2476 R. S. 1881, that where a man marries the mother of an illegitimate child, and acknowledges it as his own, such child shall be deemed legitimate, the *status* of the child is fixed for all purposes, so that such child is entitled to an interest in property devised to its father for life with remainder in fee to his "children."

Harness v. Harness, 364, 367 (3), 368 (3).

3. *Legitimation.—Effect.—Right to Inherit from Father Leaving Legitimate Child.*—Where the father of an illegitimate child married its mother and acknowledged the child as his own, such child is deemed legitimate under the provisions of §3001 Burns 1908, §2476 R. S. 1881, and, although the father was thereafter divorced and married another woman by whom he had children

BASTARDS—Continued.

who survived him, such child was entitled to inherit from its father and its right was not affected by §3000 Burns 1908, Acts 1901 p. 288, providing that an illegitimate child may inherit from its father who has acknowledged it as his own, except in case the father left surviving legitimate children or descendants of legitimate children. *Harness v. Harness*, 364, 366 (1).

BILLS AND NOTES—

1. *Material Alterations.*—Unauthorized alterations of a note, which vary the legal effect thereof to the advantage of the person making such alterations, are sufficient to avoid the contract.
LaGrange v. Coyle, 140, 144 (2).
2. *Action.—Material Alterations.—Answer.—Sufficiency.*—In an action on a promissory note, a sworn paragraph of answer admitting the execution and delivery of the note sued on, but alleging that after the signing and delivery, and without the consent or knowledge of defendant, the same was materially altered and changed by inserting certain words in the body thereof, so that the note sued on was not in terms the note executed, was sufficient as against a demurrer without alleging that the alteration of the note was made by the party claiming under it.
LaGrange v. Coyle, 140, 144 (1).
3. *Action by Heirs.—Complaint.—Sufficiency.—“Only Children.”*—In an action by the heirs at law of a decedent to recover on a promissory note executed to him, where the complaint alleged that no letters of administration had been granted on the estate, that decedent left no widow surviving him and that at the time of his death he left plaintiffs “as his children and only children and only heirs at law” and that they are the owners of the note, the phrase “only children,” in the absence of words of qualification, must be construed to include deceased as well as living children, and the averments were sufficient to show the right of plaintiffs to maintain the action. *Barrett v. Sipp*, 304, 307 (1).

BOARD OF COUNTY COMMISSIONERS—

See HIGHWAYS 1-3.

BONA FIDE PURCHASERS—

A *bona fide* purchaser of real estate without notice takes the same free from secret equities, and after acquired notice does not affect his rights, see VENDOR AND PURCHASER 1; *Young v. Waggoner*, 202, 206 (5).

BOND—

Action on, see JUSTICE OF THE PEACE 1-4.

Action on, of a saloon-keeper, see INTOXICATING LIQUORS.

Contract for sale of land is in form of a, see SPECIFIC PERFORMANCE.

Construction of, executed by a copartner, see PARTNERSHIP 4;
Barker v. McClelland, 296, 302 (2).

BONDS—

See PRINCIPAL AND SURETY 1-3.

Construction.—Variation of Terms.—Where a bond is definite and certain, nothing can be read into it which might in any way vary its terms and conditions. *Barker v. McClelland*, 296, 302 (3).

BONUS—

Factory, see SUBSCRIPTIONS 5-9.

BRIEFS—

See APPEAL 32-48.

Time for filing, see TIME 2.

BURDEN OF PROOF—

Where defendant pleads accord and satisfaction he has, see ACCORD AND SATISFACTION 1.

In an action for recovery of money advanced on an unaccepted draft, see GUARANTY 2.

In an action for the price of staves sold, the burden was on plaintiff to show a delivery of the goods described in the contract, see SALES 1.

In an action for injuries to an interurban railroad motorman caused by a collision due to the incompetency of the trainmaster the burden was on plaintiff to show that he had no knowledge of such incompetency, see MASTER AND SERVANT 9.

BY-LAWS—

Fraternal societies cannot amend their, so as to impair or modify contracts of insurance previously made, see INSURANCE 1.

CARRIERS—

1. *Railroads.—Passengers Alighting.—Duty of Carrier.*—A railroad company owes a passenger the duty to allow a reasonable time to alight before again putting the train in motion.
Lake Erie, etc., R. Co. v. Beals, 450, 455 (7).
2. *Railroads.—Duty as to Passengers Alighting.—Rule as to Street-Car Passengers Not Applicable.*—While the conductor of a street-car must use the highest degree of care to see that no person is in the act of alighting at the time the car is started, the rule does not apply in the operation of a railroad passenger-train.
Lake Erie, etc., R. Co. v. Beals, 450, 457 (12).
3. *Railroads.—Passengers Alighting.—Negligence.*—Where a railroad company stops its train at the station platform a sufficient length of time to allow passengers a reasonable opportunity to alight, the sudden starting of the train will not constitute negligence even though a passenger is at the time alighting, unless such fact is known to the servants of the company who give the directions to start the train.
Lake Erie, etc., R. Co. v. Beals, 450, 455 (9).
4. *Railroads.—Passengers Alighting.—Negligence.—Starting Train.*—A railroad company will be held guilty of a breach of duty amounting to negligence in starting the train, if its servants caused the train to be started with knowledge that at the time a passenger is in the act of alighting, even though a reasonable time had been allowed for all passengers to alight.
Lake Erie, etc., R. Co. v. Beals, 450, 455 (8).
5. *Railroads.—Duty as to Passengers Alighting.—Instructions.—Refusal.*—In an action against a railroad company by a passenger for injuries caused by alleged negligence in suddenly starting the train while plaintiff was in the act of alighting therefrom, the refusal of instructions tendered by defendant, which correctly defined and limited the duties of the defendant with reference to

CARRIERS—Continued.

the stopping of trains to discharge passengers, the length of time trains should remain standing for that purpose, and the care required in again putting the same in motion, was erroneous.

Lake Erie, etc., R. Co. v. Beals, 450, 459 (14).

6. *Railroads.—Passengers.—Assistance in Alighting.—Duty of Carrier.*—Where a carrier has provided a safe and suitable place for passengers to alight and gives them a reasonable time to do so, it is not ordinarily required to tender assistance to a passenger in the act of alighting, except where by reason of sickness, age, infirmity, or some other cause known to the carrier or its servants, he is in need of assistance.

Lake Erie, etc., R. Co. v. Beals, 450, 453 (2).

7. *Railroads.—Passenger Alighting from Train.—Negligence.—Instructions.—Conformity to the Issues.*—In an action by a passenger for injuries sustained in alighting from a train, where the question of negligence in failing to assist the plaintiff in alighting was not in issue, the giving of an instruction on that subject was error, although the instruction given was a correct statement of the law as an abstract proposition.

Lake Erie, etc., R. Co. v. Beals, 450, 457 (13), 459 (13).

8. *Railroads.—Passengers.—Complaint.—Allegation of Negligence.—Proof.*—In support of an allegation that while plaintiff was alighting from a train the servants of defendant railroad company negligently and without notice caused the train to start suddenly with such speed as to throw plaintiff to the station platform, plaintiff is permitted to prove any act or omission, in reference to the starting of the train, which constituted the violation of any duty owing to plaintiff as a passenger.

Lake Erie, etc., R. Co. v. Beals, 450, 455 (6), 456 (6).

9. *Railroads.—Passengers.—Complaint.—Allegation of Negligence.—Sufficiency.*—A complaint by a passenger for injuries in alighting from a train, alleging that while plaintiff was in the act of alighting, the defendant's servants negligently, and without notice caused the train to start suddenly with such speed as violently to throw plaintiff to the platform, sufficiently charged negligence without averring the particular duty which was violated, or the particular acts or omissions which constituted such violation of duty.

Lake Erie, etc., R. Co. v. Beals, 450, 454 (4).

10. *Railroads.—Passengers.—Negligence.—Failure to Assist Passenger in Alighting.—Complaint.—Sufficiency.*—In an action by a railroad passenger to recover for injuries in alighting from a train, a complaint, charging several acts of negligence, and charging negligence in the failure of defendant's servants to assist plaintiff in alighting, was insufficient as to such charge, where there were no allegations showing a duty to render such assistance or that the failure to render such assistance was the cause of the injury.

Lake Erie, etc., R. Co. v. Beals, 450, 454 (3).

11. *Railroads.—Passengers.—Instructions.—Injuries in Alighting.—Negligence.*—In an action by a railroad passenger for injuries caused by negligently starting the train while the passenger was in the act of alighting, an instruction that it was the duty of defendant's servants, before starting the train, to exercise reasonable care to inform themselves as to whether passengers were in the act of getting off, and, if they were trying to get off, to leave the car standing a sufficient time for all passengers, including the plaintiff, to get off in safety, was erroneous in that it required defendant to ascertain whether a passenger was in the act of

CARRIERS—Continued.

alighting before starting the train, regardless of whether a reasonable time had been allowed for passengers to alight.

Lake Erie, etc., R. Co. v. Beals, 450, 456 (11).

12. *Carriers of Passengers.—Alighting from Street Car.—Duty of Employe.—Instruction.*—Employes of street railways must use the highest degree of care to see and know that no passenger is alighting from a car before putting it in motion, but are not required absolutely to see and know, and the trial court committed no error in refusing an instruction, in an action for personal injuries sustained while alighting from a street car, which told the jury that the law requires the employes of street railways to do more than stop reasonably long enough for passengers to alight safely, that they are bound to ascertain and know that no passenger is in the act of alighting before putting the car in motion again. *Caughell v. Indianapolis Traction, etc., Co.*, 5, 7 (1).

13. *Carriers of Passengers.—Starting Car.—Duty of Conductor.—Instruction.*—The duty of a conductor who stops his car for passengers to alight is two-fold—he must wait a reasonable length of time for the passengers to alight, and then he must exercise the highest degree of care consistent with the proper transaction of the business to see and know that no passenger is in the act of alighting before putting the car in motion, and an instruction is improper which is based on the assumption that when the conductor had waited a reasonable length of time the defendant was not liable unless the conductor actually saw plaintiff attempting to alight when he started the car, regardless of whether he was exercising the proper degree of care to see and know that no one was alighting at that time.

Caughell v. Indianapolis Traction, etc., Co., 5, 8 (2).

CHANGE OF VENUE—

1. *Statute.*—The statute, §422 Burns 1908, §412 R. S. 1881, imperatively requires the court to grant a change of venue in civil actions, where the application is in conformity with the provisions thereof. *Federal Cement Tile Co. v. Korff*, 608, 615 (8).

2. *Rule of Court.—Operation and Effect.*—A rule of court may regulate the manner and time of making an application for a change of venue but, the right to a change being statutory, a rule of court cannot abrogate the same or prevent its exercise.

Federal Cement Tile Co. v. Korff, 608, 614 (5).

3. *Motion.—Diligence.*—An applicant for a change of venue cannot be required to show that he was diligent in his efforts to ascertain within the time fixed by rule of court if conditions existed affecting his right to a fair and impartial trial.

Federal Cement Tile Co. v. Korff, 608, 615 (7).

4. *Rule of Court.—Cause for Change Discovered After Time Fixed for Making Application.*—Where a party has knowledge of the facts on which the right to a change of venue is predicated in time to comply with a rule of court regulating the time of applying therefore, a failure to apply within the time fixed is deemed a waiver of the right, but the right is not waived where the facts are unknown to the party within the time so fixed.

Federal Cement Tile Co. v. Korff, 608, 615 (6).

5. *Court Rule.—Motion.—Sufficiency.*—Where a rule of court required that application for change of venue must be made at least three days before the case is set for trial, except when the reason for the change is not known within the time specified, a

CHANGE OF VENUE—Continued.

motion and affidavit setting out one of the causes provided by statute and stating that defendant did not know of the existence of said cause until the day preceding the day of trial and that as soon as defendant was informed thereof the motion and affidavit were made, was sufficient to relieve the applicant of such rule.
Federal Cement Tile Co. v. Korff, 608, 613 (4).

"CHILD" AND "CHILDREN"—

See WORDS AND PHRASES.

CHURCH—

Acts of, officers, see TRUSTS; *Essex v. Hopkins*, 316, 322 (4).

COAL—

Mine employe, action for death of, see MASTER AND SERVANT 17.

COMMISSION—

Contract for sale of real estate; sufficiency of, see CONTRACTS 12.

COMMON LAW—

At, a person is presumed to be living for seven years after his disappearance, and a presumption of death arises only from an unexplained absence for that length of time, see DEATH 2.

COMPOSITIONS WITH CREDITORS—

1. *Form.—Requisites.*—A composition agreement is not required to be in writing. *Atlas Engine Works v. First Nat. Bank*, 549, 552 (2).
2. *Agreement.—Consideration.*—The consideration on which a composition agreement rests consists of the mutual promises between the creditors themselves, whereby they each agree for the benefit of all to forego some right which they might enforce against their common debtor.
Atlas Engine Works v. First Nat. Bank, 549, 553 (5).
3. *Written Agreement.—Effect as to Creditor Not Signing.*—Where a written composition agreement is not signed by one of the creditors, it may still be binding upon him if he either directly or indirectly agreed with the other creditors that he would settle his claims against their common debtor on the terms and under the conditions thereof.
Atlas Engine Works v. First Nat. Bank, 549, 552 (3).
4. *Pleading.—Answer.—Presumption as to Signing Agreement.*—In an action on a promissory note, where an answer was based on an alleged written composition agreement with defendant's creditors, but failed to aver that plaintiff signed such agreement, the presumption is that plaintiff did not do so.
Atlas Engine Works v. First Nat. Bank, 549, 552 (1).
5. *Secret Preferences.—Effect.*—Where a creditor, who has not signed a composition agreement, agreed to settle with the debtor upon the terms and conditions thereof, and the creditors signing the agreement are thereby induced to make a settlement on its terms in the belief that he is settling on the same terms, any secret arrangement with the debtor whereby he is to obtain an advantage over the other creditors is such fraud as vitiates the

COMPOSITIONS WITH CREDITORS—Continued.

whole agreement; but where he has in no way agreed to abide by the terms of such agreement, he may proceed to settle his claim in his own way and is permitted to retain any advantage he may obtain thereby.

Atlas Engine Works v. First Nat. Bank, 549, 553 (4).

8. *Parol Agreement. — Pleading. — Answer. — Counterclaim. — Sufficiency.*—In an action on a promissory note, where defendants contended that it was void as being a secret preference over other creditors under a written composition agreement, a paragraph of answer and a counterclaim alleging that plaintiff was requested to grant defendant an extension of time and accept notes for defendant's indebtedness under and in accordance with such agreement, and that plaintiff refused to do so without having and receiving an advantage over such other creditors, but which failed to allege that plaintiff had signed such agreement, were each insufficient to show that plaintiff had entered into the composition agreement by parol, in the absence of averments that the settlement with any other creditor depended upon or was made on the faith of the settlement with plaintiff or that any of the other creditors were influenced thereby.

Atlas Engine Works v. First Nat. Bank, 549, 554 (6).

COMPROMISE—

See ATTORNEY AND CLIENT.

Except in cases of emergency, or when specially authorized so to do, an attorney has no authority to compromise a claim placed in his hands for collection, see ATTORNEY AND CLIENT.

CONDITIONS—

Subsequent in deeds are not favored in law and are strictly construed, see DEEDS 1; *Taylor v. Campbell*, 515, 523 (4).

CONSIDERATION—

See CONTRACTS; COMPOSITIONS WITH CREDITORS 2; FRAUD 2; SUBSCRIPTIONS.

See LANDLORD AND TENANT 1; *Powell v. Jones*, 493, 496 (2).

CONSTABLE—

Liability for acts of special, see JUSTICE OF THE PEACE 3, 4.

CONSTITUTIONAL LAW—

Statutes. — Subject. — Title.—Under the provisions of the Constitution (Const., Art. 4, §19) the subject-matter of a legislative enactment must be expressed in its title, and a failure in this respect will invalidate the part not so expressed.

Milligan v. Arnold, 559, 562 (2).

CONSTRUCTION—

See PARTITION 3; PLEADING 11-13.

Of bonds, see PRINCIPAL AND SURETY.

Of bond, see BONDS; *Barker v. McClelland* 296, 302 (3).

Of bond, see PARTNERSHIP 4; *Barker v. McClelland* 296, 302 (2).

Of contracts, see CONTRACTS 5-8.

Of deeds, see DEEDS 1-6.

CONSTRUCTION—Continued.

Of statute concerning education, see **SCHOOLS AND SCHOOL DISTRICTS** 3.

Of gas leases, see **MINES AND MINERALS** 2.

Of lease, see **LANDLORD AND TENANT** 3, 5.

Of mechanics' lien law, see **MECHANICS' LIENS** 2.

Of mortgage, see **MORTGAGES** 1-5.

Of statutes, see **STATUTES**.

Of wills, see **WILLS**.

CONTRACTS—

See **EVIDENCE** 8; **FRAUDS, STATUTE OF** 2; **INSURANCE**; **PARTNERSHIP** 5; **RAILROADS**; **SALES**.

For sale of land, see **SPECIFIC PERFORMANCE** 1-5; **VENDOR AND PURCHASER**.

By school trustees, see **SCHOOLS AND SCHOOL DISTRICTS** 1.

Where a township trustee does not proceed in the manner provided by the statute under which he seeks to bind his township, the contract is void and no subsequent act can estop the township from setting up its invalidity, see **OFFICERS** 2.

1. *Requisites.—Offer and Acceptance.*—A contract is created by an offer and acceptance, and the acceptance must be unconditional and in the terms of the offer.

Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co., 59, 67 (3).

2. *Validity.—Public Policy.—Manner of Determining Question of Public Policy.*—In determining whether a contract is contrary to public policy the courts will look first to legislative declarations on the subject, if any, and secondly to their judicial interpretation.

Moon v. School City, etc., 251, 256 (3).

3. *Validity.—Public Policy.*—Courts cannot arbitrarily declare a contract void as against public policy, and, where the power to make the contract is given by statute, the reasons for declaring it void should clearly appear before the court is warranted in so deciding.

Moon v. School City, etc., 251, 256 (2).

4. *Contract by Correspondence.—Validity.—Meeting of Minds.*—Where defendant wrote to plaintiff that if he would give an option for ninety days on his stock, defendant would be willing to guarantee him \$300 for it with the understanding that the corporation's indebtedness to plaintiff would be transferred with the stock, and plaintiff replied that he would sell his stock for \$300 net to him, without commission, and that on completion of the sale and payment of the purchase price, he would release his claim against the corporation, plaintiff's reply was not an unconditional acceptance of defendant's proposition so as to constitute a meeting of the minds of the parties and there was no valid and enforceable contract between them.

Atkins v. Kattman, 233, 239 (6).

5. *Construction.—Province of Court.*—Where the contract sued on was in writing, it was in the province of the court to construe same.

Miller v. Citizens Building, etc., Assn., 132, 134 (4).

6. *Construction.*—Where a contract is fairly open to two constructions, one favorable to the party in whose interest it was prepared, and one favorable to the other contracting party, the construction favorable to the latter will be adopted if consistent with the object for which the instrument was prepared.

Lechner v. Strauss, 414, 425 (5).

CONTRACTS—Continued.

7. *Construction.—Intent of Parties.*—The intent of the parties to a contract must be ascertained, if possible, by the language used therein, and not by reading into it words that import an intent wholly unexpressed when the contract was executed, but suggested by some apparent hardship in the enforcement thereof. *Beech Grove Imp. Co. v. Title Guaranty, etc., Co.*, 377, 381 (2).
8. *Sale of Real Estate.—Commission Contracts.—Statute.—Construction.*—Under §7463 Burns 1908, Acts 1901 p. 104, providing that no contract for the payment of a commission for the sale of real estate shall be valid unless the same shall be in writing, such contract is not invalid because it was not reduced to writing before the services were performed. *Doney v. Laughlin*, 38, 44 (4).
9. *Contract for Materials.—Action for Reasonable Value.—Evidence.*—In an action for the reasonable value of stone sold pursuant to a contract, the contract price is in itself *prima facie* evidence of the value. *Cullen-Fricstedt Co. v. Turley*, 468, 475 (7).
10. *Sale of Real Estate.—Commission Contracts.—Time of Execution.*—Where a seller of real estate received the benefit of services of an agent who negotiated the sale, and thereafter executed his obligation in writing to pay the agent, such instrument though executed after the sale sufficiently meets the requirements of §7463 Burns 1908, Acts 1901 p. 104. *Doney v. Laughlin*, 38, 46 (7).
11. *Sale of Real Estate.—Commission Contracts.—Description of Land.—Statute.—Evidence.*—§7463 Burns 1908, Acts 1901 p. 104, does not provide that an agreement to pay a commission for the sale of real estate shall contain a description of the real estate, and in an action on such contract parol testimony may be admitted to enable the court to properly apply the contract to the subject matter. *Doney v. Laughlin*, 38, 45 (6).
12. *Sale of Real Estate.—Commission Contracts.—Sufficiency.*—An instrument properly dated and signed, reciting that "for services rendered or commission" to the agent, "for selling my farm, paid on same \$100. Balance \$150. I agree to pay" to said agent, "due on or before February 1, 1908," is sufficient under §7463 Burns 1908, Acts 1901 p. 104. *Doney v. Laughlin*, 38, 45 (5).
13. *Commissions.—Sales of Real Estate.—Statute.*—The statute requiring contracts to pay commissions for selling real estate to be in writing (§7463 Burns 1908, Acts 1901 p. 104), was not enacted to enable owners of real estate to commit fraud and imposition against real estate agents, but to protect such owners against the imposition and fraud of such agents. *Olcott v. McClure*, 79, 91 (11).
14. *Commissions.—Sales of Real Estate.—Offer and Acceptance.—Unreasonable Delay.*—The fact that defendant's proposition to pay a commission for the sale of real estate bore the date of October 19, 1907, did not make the contract open to the objection that there was unreasonable delay in the acceptance of the proposition, where it is shown that the proposition was mailed and received in the spring of 1908, and that immediately upon its receipt the acceptance was written and mailed to defendant. *Olcott v. McClure*, 79, 88 (7).
15. *Commissions.—Sales of Real Estate.—Contract by Correspondence.—Complaint.—Allegation as to Acceptance of Employment.*—In an action to recover a commission for the sale of real estate

CONTRACTS—Continued.

under a contract made up of correspondence, the allegations of the complaint that, after receiving a letter from defendant offering certain land for sale and offering to pay a commission to any agent selling same, plaintiff mailed a letter to defendant acknowledging receipt of defendant's letter and stating that he would undertake to find a purchaser for the land according to the terms of said letter, that he would write in regard to prospective purchasers, and that defendant should come or send some one when notified by plaintiff, are sufficient to show an acceptance of the proposition made by defendant. *Olcott v. McClure*, 79, 88 (6).

16. *Commissions.—Sales of Real Estate.—Contract by Correspondence.—Identity of Parties.*—In an action on a commission contract for the sale of real estate, where the alleged contract is made up of correspondence, such correspondence, consisting of a letter offering certain land for sale and offering a commission to the agent selling same, which, though not addressed to plaintiff or any one else, was written by defendant and by him mailed in an envelope addressed to the plaintiff, a letter from plaintiff addressed to defendant stating that he would undertake to find a purchaser, and a letter from defendant acknowledging receipt of plaintiff's letter, sufficiently identified the parties to the contract. *Olcott v. McClure*, 79, 88 (5).

17. *Commissions.—Sales of Real Estate.—Correspondence.—Unilateral Proposition.—Acceptance.*—Where defendant enclosed a letter in an envelope addressed to plaintiff in which he offered certain described land for sale at a named price and stated therein that he would pay a commission of one dollar per acre to the agent with whose buyer he consummated a sale at the price and terms named, though the proposition when standing alone was merely unilateral, it became of binding effect by acceptance. *Olcott v. McClure*, 79, 87 (4).

18. *Commissions.—Sales of Real Estate.—Contract Composed of Correspondence.—Sufficiency.*—Where an alleged commission contract for the sale of real estate is composed of correspondence, its effect is to be collected from "all within the four corners" of the several letters or writings which go to make up the same, and where it appears therefrom that the minds of the parties met as to the subject matter of the contract, its description, the terms on which it was offered, and the commission to be paid in the event of sale, such correspondence is sufficient to constitute such contract. *Olcott v. McClure*, 79, 86 (3).

19. *Commissions.—Sales of Real Estate.—Statute.*—In an action to recover a commission for the sale of real estate, where the alleged contract is composed of letters written to plaintiff, the contract is governed by §7463 Burns 1908, Acts 1901 p. 104, and said section must be strictly construed in that there must be no doubt as to the existence of such written contract and no dispute as to its contents or provisions. *Olcott v. McClure*, 79, 85 (1).

20. *Contract for Materials.—Time of Payment.—Breach.—Recovery.*—Where, under a contract to furnish stone, timely payment of the amount due for monthly shipments was of the essence of the contract, defendant's failure to make such payments was a breach which absolved plaintiff from further performance on his part, and he was entitled to recover for the reasonable value of the stone furnished, less the damages suffered by defendant on account of his failure to furnish the full amount needed before the breach of the contract by defendant.

Cullen-Friestedt Co. v. Turley, 468, 474 (5).

CONTRACTS—Continued.

21. *Action.—Counterclaim.—Damages.—Proof of Breach.*—In an action to recover for stone furnished defendant, though not furnished at the time and in the manner stipulated in the contract, defendant was required to show that there had been no breach of the contract on its part, in order to recover on a counterclaim for damages, for breach thereof by plaintiff.
Cullen-Friestedt Co. v. Turley, 468, 473 (3).
22. *Mutual Promises.—Consideration.*—Mutual promises, whereby there is a mutuality of engagement, are based on sufficient consideration.
Brown v. Marion Commercial Club, 670, 676 (3).
23. *Inducement and Consideration for Contract.—Consideration.—Sufficiency.*—While there is a difference between inducement or motive to enter into a contract, and the consideration yielding for its support, yet, in the absence of fraud or mistake, the consideration regarded as such or fixed by the parties thereto will be deemed sufficient.
Brown v. Marion Commercial Club, 670, 676 (2).
24. *Contents.—Sufficiency.*—If a writing contains matter sufficient to enable the court to ascertain the subject matter and the terms and conditions of the obligation or contract to which the parties intended to bind themselves, it is sufficient.
Olcott v. McClure, 79, 86 (2).
25. *Penalties.—How Regarded in Equity.*—A court of equity regards a penalty in a contract as intended only to secure its fulfillment, and not as a source of profit or advantage in the event of a default, so that where a breach admits of compensation the injured party will be compelled to accept what is just and will not be permitted to make use of the letter of his contract to obtain more.
Walker v. Bement, 645, 657 (11).
26. *Actions.—Complaint.—Allegation of Performance.*—Ordinarily the general averment that plaintiff has performed the contract in all things on his part to be performed, will be sufficient in a complaint to recover on a contract.
Olcott v. McClure, 79, 89 (8).
27. *Written.—Parol Evidence.—Admissibility.*—Where a contract is reduced to writing, it is the repository of the entire agreement between the parties, and cannot be added to nor varied by parol evidence.
Smith v. Hunt, 592, 596 (3).
28. *Enforcement.—Remedy.*—The legal effect of a contract is of controlling influence in determining the remedy the parties may have for its enforcement.
Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 513 (7).
29. *Definition.—Termination.*—A contract is an agreement between two or more persons, based on a sufficient consideration, to do or to refrain from doing some particular thing, and its obligations remain in force on the parties thereto until terminated by performance or in some other manner recognized by law.
Smith v. Hunt, 592, 596 (4).
30. *Mutuality.—“Unilateral Contract”.*—The term “unilateral contract” is a legal solecism that has come into use as expressing the idea of a contract lacking in mutuality.
High Wheel Auto, etc., Co. v. Journal Co., 396, 398 (1).
31. *Acceptance.—Mutuality.*—Where a contract or order is signed by one of the contracting parties, and accepted by the other, and affirmative acts constituting the consideration done by the latter, the party signing cannot assert a want of mutuality in the instrument.
High Wheel Auto, etc., Co. v. Journal Co., 396, 398 (2).

CONTRACTS—Continued.

32. *Demand for Performance After Breach.*—Where the time of payment is of the essence of a contract, a party thereto while in arrears has no right to demand a performance by the other party.
Cullen-Friestedt Co. v. Turley, 468, 474 (6).
33. *Contracts for Materials. — Performance. — Breach.* — Where plaintiff's inability to comply with his contract to furnish stone to defendant in quantities up to 150 cubic yards per day was condoned by an arrangement whereby defendant was to bear with plaintiff, and purchase stone needed in the open market, and when a time should come that defendant could not use as much stone as plaintiff could furnish, plaintiff was to bear with defendant, plaintiff, on thereafter being directed by defendant to ship no more stone until further orders, could not rely on such direction as constituting a breach of the contract, unless defendant failed for an unreasonable time to give such further orders.
Cullen-Friestedt Co. v. Turley, 468, 473 (4).
34. *Contracts for Materials.—Part Performance.—Recovery on Quantum Meruit*—Where one, having a special contract to furnish materials, is prevented from completing the contract by the other party, he may recover for the materials furnished on the *quantum meruit*, not to exceed the contract price.
Cullen-Friestedt Co. v. Turley, 468, 472 (2).
35. *Contract for Materials. — Part Performance. — Recovery.* — Where one enters into a special contract to furnish materials to another, and furnishes the same, though not in the time or manner stipulated in the contract, and the other party accepts and uses the same the party furnishing such material may recover the value thereof less the damages occasioned by his failure to comply with his contract.
Cullen-Friestedt Co. v. Turley, 468, 472 (1).
36. *Sales of Real Estate.—Action for Commission.—Complaint.—Sufficiency.—Performance.*—In an action to recover a commission for the sale of real estate, where the contract was composed of correspondence consisting of defendant's letter in which defendant offered certain land for sale and stated that he would pay a commission of one dollar an acre to the agent with whose buyer he consummated a sale at the price and terms named, plaintiff's letter to defendant accepting the employment, and defendant's reply letter to plaintiff in which he wrote that he was glad plaintiff would undertake to find a purchaser for said farm, that he would consider good trades and that he would keep good his words as expressed in said first letter if he made a sale with a purchaser found by plaintiff, the allegation of the complaint, that plaintiff produced a purchaser for said land with whom the defendant consummated a sale and to whom he conveyed said land for other land and property, sufficiently shows a performance of the contract by plaintiff.
Olcott v. McClure, 79, 89 (9).

CONTRIBUTORY NEGLIGENCE—

See MASTER AND SERVANT 23, 24; NEGLIGENCE 6-12; RAILROADS 9-11, 22.

See TRIAL 33; *Rump v. Woods*, 347, 355 (9).

CONVERSION—

1. *Complaint.—Allegations.—Sufficiency.*—A complaint for conversion directly alleging that plaintiff is the owner and was in

CONVERSION—Continued.

possession of the chattels in question at the time of their conversion, is sufficient as to such allegations.

Carson v. Hanawalt, 409, 412 (1).

2. *Complaint.—Allegation as to Damage.—Sufficiency.*—In a complaint for conversion, an allegation that the property converted was of the value of \$314.33, taken in connection with the allegations as to ownership, possession and conversion, was sufficient as an allegation showing damage in the amount of the value of the property.

Carson v. Hanawalt, 409, 412 (2).

3. *Drain Tile.—Ownership.—Complaint.—Allegation of Specific Facts.*—Where a complaint for the conversion of drain tile alleged facts showing that such tile were a portion of a tile ditch constructed by the board of county commissioners for the drainage of plaintiff's land and other lands assessed to pay for its construction, that defendant, having a contract to construct a new drainage ditch along the line of the old one, entered on plaintiff's land and took therefrom the tile from the old ditch, against plaintiff's protest, and converted them to his own use, and that defendant had no title or interest in the tile whatever, such allegations showed plaintiff to have a positive interest in the property converted, and while it may have been special or qualified, it was such an interest as could be destroyed by the wrongful act of defendant, and sufficient to sustain an allegation of ownership.

Carson v. Hanawalt, 409, 412 (3).

4. *Ownership of Property Converted.—Tenants in Common.—Right to Maintain Action.*—In a complaint for the conversion of drain tile, where it was shown that at the time of the conversion plaintiff was in possession of the tile and had an interest therein, it was of no consequence whether her interest was that of complete ownership, or that of a tenant in common with other land owners whose lands had been assessed for the payment of the ditch from which the tile had been taken, for in either event defendant's wrongful appropriation thereof to his own use entitled the plaintiff to maintain the action.

Carson v. Hanawalt, 409, 413 (5).

5. *Ownership of Property.—Defense.*—The fact that property belonged to plaintiff and others cannot be used by a stranger as a defense in an action against him for conversion.

Carson v. Hanawalt, 409, 413 (6).

6. *Actions.—Ownership.—Possession.*—The plaintiff in an action for conversion must have a right of property, either general or special, and possession, or the right of immediate possession at the time of conversion.

Carson v. Hanawalt, 409, 414 (7).

7. *Action by Tenant in Common.—Damages.*—In an action for conversion, a plaintiff who is the owner as a tenant in common, is entitled to damages, as against a stranger, in the full value of the property converted, holding the surplus in excess of his interest as a trustee for the other owners.

Carson v. Hanawalt, 409, 414 (8).

8. *Directions in Will.—Realty and Personalty.*—Where a will directs land to be sold and converted into money, courts of equity will deal with the land as personalty.

Walling v. Scott, 23, 25 (1).

9. *Directions in Will.—Sufficiency of Directions.*—Where there is such a blending of the real and personal estate by the testator in

CONVERSION—Continued.

his will as clearly to show that he intended to create a fund out of both real and personal estate and bequeath the fund as money, it will be sufficient to work an equitable conversion of the real estate into money. *Walling v. Scott*, 23, 25 (2).

10. *Directions in Will.—Power of Sale.—Time.*—Where the will directed that all the property after payment of testator's debts should go to the wife during her life, and that all remaining in her possession at her death should be sold and the proceeds distributed among testator's heirs, an equitable conversion of the property took place at testator's death, although the time of sale and actual conversion was to be at the death of the life tenant. *Walling v. Scott*, 23, 26 (5).

11. *Provisions of Will.—Reconversion.*—Where a will directs a conversion of real estate into money to be divided among a number of beneficiaries, a reconversion may be had by agreement of all the beneficiaries, but one beneficiary may not reconvert his share without the consent of the others. *Walling v. Scott*, 23, 27 (8).

CONVEYANCES—

To trustees of a church, see **DEEDS** 5.

CORPORATIONS—

1. *Capital Stock.—Trust Fund for Creditors.—Stock Subscriptions.*—Money agreed to be paid into the treasury of a corporation on account of shares is regarded not only as a part of the fund for the transaction of business, but also as a trust fund for the benefit of creditors. *Haskell v. Gardner*, 1, 3 (1).
2. *Insolvency.—Receivers.—Unpaid Stock Subscriptions.*—Upon the insolvency of a corporation, a receiver therefor may be authorized to sue on account of unpaid stock subscriptions, but generally he cannot compel payment of a subscription that the corporation could not have enforced at the time of his appointment. *Haskell v. Gardner*, 1, 3 (2).
3. *Action on Stock Subscriptions.—Payment.—Instructions.*—In an action brought by the receiver of an insolvent corporation to recover on a subscription to its capital stock, an instruction which told the jury that defendant was entitled as a creditor of the corporation to have his claim set-off against the amount alleged to be due from him on such subscription, even if erroneous, was harmless, where defendant had pleaded payment and there was evidence to sustain such plea. *Haskell v. Gardner*, 1, 5 (4).
4. *Insolvency.—Receivers.—Action on Stock Subscription.—Defense.—Payment in Property.*—In an action by the receiver of a corporation on a stock subscription, where the evidence showed that defendant had sold to the corporation certain property which was of a value equal to that of the stock subscribed by defendant, and which was necessary in the business of the corporation and was received by it in payment of such subscription, the status of such stock was that of paid up stock, it being unnecessary, in the absence of a statutory requirement, that a subscription to capital stock shall be paid in cash. *Haskell v. Gardner*, 1, 3 (3).

COUNTY AUDITORS—

See **HIGHWAYS** 2.

COUNTY TREASURERS—

See **HIGHWAYS 2**.

COURTS—

Failure to comply with rules of, see **APPEAL 40, 43**.

Right of appellee, where appellant fails to comply with rules of, see **APPEAL 43**.

1. *Rules.—Effect.*—When rules of court are adopted and published, they have the force and effect of law, and are obligatory upon the court, as well as upon the parties to causes pending before it. *Webster v. Bligh*, 58, 58 (3).

2. *Jurisdiction.—Superior Court.—Action to Replevy Property Taken on Execution Issued by Justice of the Peace.*—Where an execution plaintiff assumed control of an execution issued on a judgment had before a justice of the peace and directed the constable in making a levy, an action in replevin against the execution plaintiff and the officer, by one claiming to be the owner of the property levied on, was properly brought in the superior court. *McFerran v. Swayne*, 50, 55 (4).

COVENANTS—

Of warranty, see **DEEDS 6**, *Ragle v. Dedman*, 359, 361 (2).

Covenants Running With the Land.—Gas Lease.—A covenant in a gas lease whereby the lessee is to furnish lessor with gas to light and heat the dwellings on the premises within sixty days from date of the lease, or in lieu thereof the sum of twenty dollars yearly in advance, is a covenant running with the land for a breach of which the grantee of the lessor has a right of action. *Indiana Nat. Gas, etc., Co. v. Harper*, 555, 557 (1).

CREDITORS—

Relief to, see **FRAUD 2**.

CROSSINGS—

See **RAILROADS 5**.

Accidents on, see **RAILROADS 6-12**.

CUSTOMS AND USAGES—

1. *Customs Relating to Matters of Law.*—Proof of a custom will not be received when in conflict with well settled rules of law. *High Wheel Auto, etc., Co. v. Journal Co.*, 396, 399 (4).

2. *Sales.—Quality of Article Sold.—Evidence.*—For the purpose of determining whether staves sold under a contract were No. 1 or No. 2 grade, it was competent to show the custom of the trade as to the meaning of such terms.

Gandy v. Seymour Slack Stave Co., 72, 77 (5).

3. *Operation.—Construction of Contract.*—A custom or usage long continued and uniform, generally known and acquiesced in, may be shown in a proper case, where there is doubt in construing a contract or in ascertaining the manner of discharging some duty. *High Wheel Auto, etc., Co. v. Journal Co.*, 396, 399 (3).

4. *Operation.—Unambiguous Contract.—Answer.*—In an action on a contract for space at an exhibition, where the contract contained a direct and positive promise to pay an amount certain at a time certain without conditions or qualifications, an answer alleging certain customs of the trade, exempting defendants from

CUSTOMS AND USAGES—Continued.

the obligation to pay for such space, was insufficient, since the parties had a right to contract against custom and the contract was not open to construction or explanation.

High Wheel Auto, etc., Co. v. Journal Co., 396, 400 (5).

5. *Sales.—Instructions.—Invading Province of Jury.*—In an action to recover the price of staves sold under a contract calling for No. 1 and No. 2 staves, where plaintiff's president testified that the grades were fixed by the manufacturer, and there was evidence to support defendant's contention that the grades mentioned were those established by a cooperage manufacturers' association, an instruction which told the jury that, if it found such contract to have been entered into, the grades named therein were the grades known and recognized by those engaged in the manufacture and sale of cooperage stock at the place where the staves were manufactured, took from the jury the question as to what the terms used in the contract meant and was erroneous.

Gandy v. Seymour Slack Stave Co., 72, 77 (6).

DAMAGES—

See BAILMENT 2.

See CONTRACTS 21; *Cullen-Friestedt Co. v. Turley*, 468, 473 (3).

See CONVERSION 7; *Carson v. Hanawalt*, 409, 414 (8).

Measure of, see SALES 6.

Action for, resulting from unlawful sales of liquors, see INTOXICATING LIQUORS 1-14.

The provision of the statutes for granting a new trial on the ground of excessive, applies only to tort actions, see NEW TRIAL, 2; *Boggs v. Toney*, 289, 290 (1).

Allowing of, by board of county commissioners on ordering the opening of a highway is not a judgment against the county, see HIGHWAYS 1; *Lortz v. Davis*, 337, 346 (3).

1. *Complaint.—Averments.—Sufficiency.*—A pleading which fails to allege that the complaining party is damaged, and contains no averment of facts from which an inference of damages can be forced, is insufficient as a complaint for damages.

Atkins v. Kattman, 233, 237 (3).

2. *Liquidated Damages.—Penalty.—Distinction.*—When the damages likely to be occasioned by the breach of a contract are uncertain, and the sum fixed to be recovered on such breach is not grossly excessive or unjust, it will be treated as liquidated damages, but if the damages likely to be occasioned are susceptible of certain proof, and the amount stipulated to be paid on the breach is in excess of that amount, it will be treated as a penalty.

Walker v. Bement, 645, 658 (12).

DEATH—

1. *Presumptions.—Burden.*—Where one is shown to have been alive at a certain time, the presumption of life continues and the burden of proving that he is dead rests on the party asserting such fact.

Metropolitan Life Ins. Co. v. Lyons, 534, 538 (4).

2. *Presumption from Absence.—Common Law Rule.*—At common law a person is presumed to be living for seven years after his disappearance, and a presumption of death arises only from an unexplained absence for that length of time.

Metropolitan Life Ins. Co. v. Lyons, 534, 538 (2).

DEATH—Continued.

3. *Presumption from Absence.—Statutory Provisions.—Scope.*—The provisions of §2747 Burns 1908, §2232 R. S. 1881, and §2748 Burns 1908, Acts 1883 p. 209, which create a presumption of death from one's absence from his usual place of residence for the space of five years relate exclusively to the settlement of the estates of absentees.

Metropolitan Life Ins. Co. v. Lyons, 534, 537 (1).

4. *Presumption from Absence.—Evidence.—Proof of absence for seven years will not alone give rise to the presumption of death, but in addition to such absence it must be shown that the absent person left for a temporary purpose and has not returned and that those most likely to hear from him have received no word or tidings from him; and where the absentee established a residence abroad, the presumption of death will not arise from the fact that his family and friends have heard nothing from him for seven years unless it is also shown that due inquiry was made at the place of such residence and that no tidings of him could be obtained.*

Metropolitan Life Ins. Co. v. Lyons, 534, 538 (5).

5. *Evidence.—Hearsay.*—The death of an individual, though disconnected from any question of pedigree, and for whatever purpose sought to be established, may be proved by hearsay, subject to the same restrictions that are applicable in cases where matters of pedigree are involved.

Metropolitan Life Ins. Co. v. Lyons, 534, 544 (9).

6. *Evidence.—Extent of Rule Admitting Hearsay.*—The rule as to the admission of hearsay evidence to prove the death of an individual extends only to the general reputation in the family of such person and among his kindred.

Metropolitan Life Ins. Co. v. Lyons, 534, 544 (10).

7. *Evidence.—Hearsay.—Declaration by One Not Related to Family.*—In an action on a life policy, testimony of a witness that he and his deceased brother knew the insured and that the brother had told witness that the insured was drowned, was inadmissible because it did not appear that the declarant was a member of the insured's family or that he was related thereto by blood or marriage, and also for the reason that the fact of the insured's death was not one of such remote origin as to be known only by reputation and family tradition.

Metropolitan Life Ins. Co. v. Lyons, 534, 545 (12).

8. *Proof of Death as a Fact.—Evidence.—Sufficiency.*—Where it is necessary to prove the death of an absentee at a particular time short of the time required to establish the presumption of death, it may be shown by direct evidence or by proof of circumstances from which such death may be rightly and reasonably inferred, but not by facts and circumstances alone which would be sufficient only to create a presumption of death after the lapse of seven years.

Metropolitan Life Ins. Co. v. Lyons, 534, 539 (6).

"DECISION CONTRARY TO LAW"—

See WORDS AND PHRASES.

DECLARATIONS—

Of deceased persons, when admitted, see EVIDENCE 3.

DEEDS—

1. *Conditions Subsequent.—Construction.*—Conditions subsequent in deeds are not favored in law and are strictly construed.
Taylor v. Campbell, 515, 523 (4).
2. *Construction.*—Where the wording of a deed is subject to more than one construction, it must be construed so as to effectuate the intention of the contracting parties.
Ragle v. Dedman, 359, 362 (5).
3. *Construction.*—The language of a deed will be construed so as to ascertain, if possible, the intention of the parties, and where the deed admits of two constructions, the one least favorable to the grantor will be adopted. *Taylor v. Campbell*, 515, 523 (5).
4. *Construction.—Defeasible Estates.—Conditions Subsequent.*—Where a conveyance of land to the trustees of a church recited that it was to be held in trust for the use of the members of such church according to its rules and discipline, and imposed no restraint on alienation and contained no provision for forfeiture in the event the property ceased to be used for church purposes, the recital that the grant was in trust for the uses and purposes therein set out did not create a defeasible estate nor condition subsequent for the violation of which a forfeiture or reversion would result, but was merely a directory provision enforceable at the instance of the church.
Taylor v. Campbell, 515, 524 (6).
5. *Conveyance to Trustees of Church.—Construction.—Estate Conveyed.*—A conveyance to named persons, designated as the trustees of the parsonage of a ministerial charge, and their successors in office, "in trust for the use and benefit of the ministry and membership of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage and ministerial appointments of said church," and providing for disposition of the proceeds, in the event of sale, in accordance with said discipline, does not give to either of the churches composing such ministerial charge any legal estate or interest in the property conveyed.
Essex v. Hopkins, 316, 321 (2).
6. *Covenant of Warranty.—Construction.—Statute.*—Where a deed recites that the grantor "conveys and warrants" the premises, the provisions of §3958 Burns 1908, §2927 R. S. 1881, that such a deed shall be deemed a conveyance in fee simple, with covenant that the grantor is lawfully seized of the premises, that he guarantees quiet possession thereof, that the same are free from all incumbrances and that he will warrant and defend the title to the same against all lawful claims, should, in the construction of such deed, be read into it as if written therein at full length.
Ragle v. Dedman, 359, 361 (2).
7. *Conveyance by Joint Tenants.—Covenants.—Joint or Several Nature.*—Where land was conveyed by warranty deed by tenants in common who had acquired the same by descent, and at the time there was a valid judgment against one of the tenants which was a lien on his interest, the covenants in the deed, in the absence of language limiting them to the separate interests, must be construed as joint and as rendering all the tenants liable for the breach of the covenant arising from the existence of such judgment lien.
Ragle v. Dedman, 359, 363 (7).
8. *Operation.—Judicial Power.*—Where the language employed in a deed is not uncertain, the contract as expressed in the deed must be enforced as made, although, in the opinion of the court, it may seem in some respects inequitable.
Ragle v. Dedman, 359, 363 (6).

DEEDS—Continued.

9. *Execution.—Merger of Previous Negotiations.*—Upon the execution of a deed, all previous negotiations in reference thereto, whether parol or written, are merged therein and the terms of the deed will control. *Essex v. Hopkins*, 316, 321 (3).

DEFAULT—

Setting aside, see JUDGMENT.

DEPOSITIONS—

A motion to strike out answers to questions in a, how made part of record, see APPEAL 20.

Rulings on motion to strike out parts of, cannot be considered as independent assignment of errors on appeal, but are proper grounds for new trial, see APPEAL 25.

1. *Motion to Strike Out.—Statute.*—Section 662 Burns 1908, Acts 1903 p. 338, relative to motions to insert new matter or to strike out parts of pleadings, depositions, etc., is mandatory in its requirements that such motions shall be in writing.

Steele v. Michigan Buggy Co., 635, 638 (4).

2. *Examination Before Trial.—Corrections.*—Where a deposition or examination is presented to a witness or party for his signature, he may have any corrections made therein necessary to make it speak the truth, but such corrections should be made before the notary taking the deposition or examination, either on notice to the opposite party or his attorney, or on voluntary appearance.

Rump v. Woods, 347, 357 (14), 358 (14).

DEMURRER—

See PLEADING 20-25.

DESCENT AND DISTRIBUTION—

Debts of Intestate.—Liability of Heirs.—An action brought by an administrator *de bonis non*, for and on behalf of the estate which he represents alone, to recover from the heir of an intestate for breach of a bond which said intestate signed as surety, cannot be maintained where it appears from the complaint that there has been no administration on the estate of said surety, and there are no averments with reference to any other debts against, or creditors of said estate. *Craven v. State, ex rel.*, 30, 33 (1).

DISCRETION OF COURT—

The appointment of a coadministrator lies in the, see EXECUTORS AND ADMINISTRATORS 1.

The order of the admission of evidence is ordinarily a matter within the sound, and will furnish no ground for reversal unless there has been a clear abuse of such discretion, see APPEAL 58.

Trial court is vested with a certain discretion in setting aside defaults and courts of appeal are reluctant to disturb its action where such relief has been granted, see JUDGMENT 7.

DRAFT—

Recovery of money advanced on an unaccepted, see GUARANTY 2.

DRAINS—

1. *Use.—Right to Use Surface Drain for Sanitary Sewage.—Municipal Corporations.*—A city that has been assessed for the construction of a public ditch for the drainage of surface water, has, by virtue of such assessment, the right to drain the surface water from its streets and alleys into and through the same, but does not have the right to use such ditch as an outlet for sanitary sewage from buildings located on private lots not assessed.
Geiger v. Town of Churubusco, 685, 690 (3).
2. *Statutes.—Repeal.—Repeal by Implication.*—The act of March 11, 1907 (§6140 Burns 1908, Acts 1907 p. 508), which relates to the repair and cleaning of ditches, expressly repeals all laws theretofore enacted in relation to drainage, except as to certain pending proceedings, and the act of March 12, 1907 (§6160 Burns 1908, Acts 1907 p. 600), which is declared to be supplemental to said act of March 11, together fully cover said subject and provide additional penalties not found in the old law, so that, although that portion of §10 of an act approved March 6, 1905 (Acts 1905 p. 456, §5631 Burns Supp. 1905), providing "that such parts of public drains as are within the corporate limits of any city or town shall be kept in repair by such city or town," is not found in either of said acts of 1907, by giving to the repealing clause of the act of March 11, 1907, the broad scope it seems to have and considering the legislative intent as gathered from the title of the act of March 12, 1907, said acts operated to repeal §10 of said act of March 6, 1905.
Milligan v. Arnold, 559, 560 (1), 563 (1).

"DUTY"—

See WORDS AND PHRASES.

ELECTION OF REMEDIES—

- Acts Constituting Election.*—Where defendant's agents bought a car of lemons and shipped them to defendant, attaching draft to bill of lading, and delivered said bill of lading and the attached draft to the plaintiff, who, relying on a written guaranty of the defendant to pay all drafts drawn by said agents when presented, advanced the amount of said draft to said agents, and afterwards, on the refusal of defendant to accept the lemons and pay the draft, turned the draft and bill of lading back to said agents with directions to sell the lemons and apply the proceeds to the payment of the draft, such would not constitute an election of remedies and would not estop the plaintiff from afterwards collecting from the defendant the balance of the money advanced on said draft.
Goldsmith v. First National Bank, 11, 16 (5).

ELECTIONS—

1. *Recount.—Appeal.—Jurisdiction.*—The Appellate Court acquires no jurisdiction on appeal from a judgment dismissing a petition for recount of votes where it appears from the record that the lower court had no jurisdiction to grant the relief prayed.
Watkins v. Forkner, 35, 37 (2).
2. *Recount.—Undertaking for Costs.—Jurisdiction.—Dismissal of Petition.*—The filing of a sufficient undertaking for costs is a condition precedent in a proceeding to recount votes under §§6990, 6991 Burns 1908, §§4738, 4739 R. S. 1881, and until it is filed the court is without authority to grant the prayer of the petition and the same may be dismissed for want of jurisdiction.
Watkins v. Forkner, 35, 37 (1).

ELECTIONS—Continued.

3. *Recount.—Acquiescence in Result.—Dismissal of Appeal.*—Where it appears that pending an appeal from a judgment dismissing a petition for a recount of votes, the successful candidate resigns, and the contestant acquiesces in the result of the election by becoming a candidate to fill the vacancy, the appeal will be dismissed. *Watkins v. Forkner*, 35, 37 (3).

"EQUITABLE ELECTION"—

See WORDS AND PHRASES.

EQUITABLE ESTOPPEL—

See ESTOPPEL.

EQUITY—

How penalties in a contract are regarded in a court of, see CONTRACTS 25, *Walker v. Bement*, 645, 657 (11).

Where a debtor makes a payment to one to whom he owes several debts and neither he nor the creditor makes a specific appropriation thereof, the court will apply it according to the equity and justice of the case, see PAYMENT 6; *Barrett v. Sipp*, 304, 311 (8).

Suits.—Real Party in Interest.—As a general rule a suit in equity must be prosecuted in the name of the real party in interest. *State, ex rel., v. Liberty Tp., etc.*, 208, 213 (3).

ESTOPPEL—

See PARTNERSHIP 2, 3.

Of landlord, see LANDLORD AND TENANT 21.

1. *Equitable Estoppel.—Equitable Election.*—Equitable election is the obligation imposed upon a party to choose between two inconsistent or alternative rights where there is a clear intention that he should not enjoy both. *Walker v. Bement*, 645, 659 (15).
2. *Waiver.—Distinction.*—While a person cannot waive a right before he is in a position to assert it, he may be estopped from asserting the right by words and conduct causing other persons relying thereon to act in such a way as to place them at a disadvantage. *Templer v. Muncie Lodge, etc.*, 324, 333 (9).
3. *Estoppel In Pais.—Elements.*—To constitute an estoppel in pais, there must have been a representation or concealment of material facts made with a knowledge of the facts, and with the intention that the other party should act upon it, and the party to whom the representation was made must have been ignorant of the truth in the matter and must have been induced thereby to act. *Steele v. Michigan Buggy Co.*, 635, 642 (10).
4. *Equitable Estoppel.—Equitable Election.—Position in Judicial Proceedings.*—Where, after executing a mortgage to secure the return of certain stock of the par value of \$19,300 loaned to him by the mortgagee, the mortgagor became a bankrupt, and, being unable to return the stock, listed the real estate described in the mortgage in his schedules in the bankruptcy proceeding as subject to a mortgage of \$19,300, and listed the claim of the mortgagee as a secured claim for the sum of \$19,300, the principles of an equitable election do not apply and, in an action subsequently brought by the mortgagee for foreclosure, the position assumed by him in the bankruptcy proceedings does not preclude those claiming under him from showing the actual value of such stock. *Walker v. Bement*, 645, 659 (14).

EVIDENCE—

See INSURANCE 8; LANDLORD AND TENANT 19, 23; LIMITATION OF ACTIONS 2; MASTER AND SERVANT; PARTNERSHIP 1-3; RECEIVERS; STREET RAILROADS; TRIAL 3-8.

Limiting application of, see APPEAL 11.

Sufficiency of statement of, in brief, see APPEAL 48.

Of absence, to prove death, see DEATH 4-8.

Of custom, when competent, see CUSTOMS AND USAGES 2.

Sufficiency to show ratification, see HUSBAND AND WIFE 5.

How the question of insufficiency of, is presented, see APPEAL 13.

In action for damages resulting from unlawful sales of liquor, see INTOXICATING LIQUORS 11-14.

Defective statement of the, in appellant's brief may be remedied by a statement in appellee's brief, see APPEAL 44.

Parol, not permitted to vary or add to a written contract, see CONTRACTS 27, *Smith v. Hunt*, 592, 596 (3).

In an action by the guardian of an insane ward to recover for injuries sustained by the ward, see INSANE PERSONS.

If a finding of the trial court is supported by some, although conflicting it cannot be disturbed on appeal, see APPEAL 60, 61.

Where there is some, in support of every material allegation of the complaint, it is error to direct a verdict for defendant, see TRIAL 15.

Contract price is *prima facie*, of the value of stone in an action for the reasonable value of stone sold pursuant to a contract, see CONTRACTS 9.

Only reasons assigned in the trial court as objections to the introduction of, will be considered on appeal, see APPEAL 1; *Taylor v. Campbell*, 515, 519 (1).

Where there was some evidence to warrant a jury in finding that there was no contributory negligence, a verdict for plaintiff will not be disturbed, see APPEAL 64.

There will be no reversal for insufficiency of, where there was some evidence to warrant the finding of the jury, see APPEAL 65.

No available error is presented on the exclusion of, where the record shows that the witness afterwards answered the question excluded, see APPEAL 79.

Tax deed is *prima facie*, of the regularity of the sale, of all prior proceedings and of the title thereby conveyed, see TAXATION 1; *Henderson v. Bivens*, 384, 386 (2).

Where brief fails to present a statement of the, so as to comply with the rules of the court, no question on the evidence is thereby presented, see APPEAL 46; *Webster v. Bligh*, 56, 59 (4).

1. *Admissible for Certain Purpose.—Limiting Effect.*—Where testimony is admissible for certain purposes only, the question of its effect and the purpose for which it should be considered by the jury are matters to be controlled by proper instructions. *Steele v. Michigan Buggy Co.*, 635, 640 (7).

2. *Hearsay.—Ground of Admissibility to Prove Pedigree.*—Hearsay evidence on matters of pedigree is admitted to prove remote facts in family history on the ground of necessity. *Metropolitan Life Ins. Co. v. Lyons*, 534, 544 (11).

EVIDENCE—Continued.

3. *Hearsay.—Declarations of Deceased Persons.—Admissibility to Prove Pedigree.*—Hearsay evidence is admissible to prove pedigree which embraces facts as to birth, marriage and death, and the date when the events happened, as well as descent and relationship, but to render the declarations of deceased persons admissible to prove such facts it must be shown that the declarants were related by blood or marriage to the family of the person to whom the declarations relate.
Metropolitan Life Ins. Co. v. Lyons, 534, 543 (S).
4. *Judicial Notice.—Terms of Court.*—The court judicially knows that a full term of the Lake Superior Court intervened between the trial of a cause on June 12, 1908, and a second trial thereof on December 2, 1908.
Federal Cement Tile Co. v. Korff, 608, 616 (10).
5. *Opinion.—Speed.—Non-Expert Witness.—Opportunity for Observing Speed.—Weight of Testimony.*—The opportunity had by a non-expert witness to observe the speed of an automobile, as to which he has expressed an opinion, may be considered as affecting the weight of his testimony.
Rump v. Woods, 347, 357 (13).
6. *Opinion.—Speed.—Non-Expert Witness.—Competency.*—One who has had some opportunity, even though limited, to observe the speed of an automobile immediately prior to its collision with plaintiff, is competent to express an opinion as to its speed without qualifying as an expert. *Rump v. Woods*, 347, 356 (12).
7. *Parol Evidence.—Explanatory of Writing.—Admissibility.*—Although parol evidence is not admissible to vary, contradict, add to or take from a written instrument, it is admissible to give effect to the instrument by applying it to the subject-matter and also to show in what sense any equivocal expressions in the writing were used by the parties.
Steele v. Michigan Buggy Co., 635, 638 (2).
8. *Parol Evidence.—Written Contract.—Superadded Term.*—Where a written contract for the purchase of staves contained no provision as to where inspection should be made, evidence of an oral agreement as to the place of inspection, made thereafter, related to a superadded term not inconsistent with the writing, and was not objectionable under the rule that all oral negotiations were merged in the contract.
Gandy v. Seymour Slack Stave Co., 72, 76 (1).
9. *Positive Evidence.*—Where witnesses, who were looking at a train as it approached a crossing and had their attention directed to it, testified that no warning of its approach to the crossing was sounded, the evidence was positive evidence.
Vandalia R. Co. v. Baker, 184, 189 (7).
10. *Value of Corporate Stock.—Prima Facie Evidence.*—The par value of a share of corporate stock is *prima facie* its actual value.
Walker v. Bement, 645, 651 (2).
11. *Writing.—Intention of Parties.*—If the words of a writing clearly express the intention of the writer, such intention will prevail and extraneous evidence cannot be admitted to show a contrary intention.
Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co., 59, 68 (5), 70 (5).

EXAMINATION—

Corrections made in, before trial, see DEPOSITIONS 2; *Rump v. Woods*, 347, 357, 358 (14).

EXCEPTIONS—

In gross, see **APPEAL 28**; *Harting v. Vandalia Coal Co.*, 98, 100 (2).

"EXCUSABLE NEGLIGENCE"—

See **WORDS AND PHRASES**.

EXECUTORS AND ADMINISTRATORS—

1. *Appointment of Administrator.—Joint Appointment.—Discretion of Court.*—The appointment of a coadministrator lies in the discretion of the court. *Curry v. Plessinger*, 166, 173 (1).
2. *Appointment of Administrator.—Procedure.*—The matter of the appointment of an administrator of the estate of a deceased person is not an ordinary proceeding and is not controlled and governed by the ordinary rules of procedure. *Curry v. Plessinger*, 166, 174 (4).
3. *Appointment of Administrator.—Statute.*—Section 2742 Burns 1908, Acts 1901 p. 281, is mandatory in its requirement that letters of administration shall be granted to the next of kin, where the application is made within the time therein provided. *Curry v. Plessinger*, 166, 175 (6).
4. *Appointment of Administrator.—Priority of Right.—Contest.—Motion for New Trial.*—Where on the filing of a verified petition and application asking the removal of an administrator and the appointment of the petitioners, the court determined the case without hearing any evidence, the overruling of a motion for a new trial was erroneous. *Curry v. Plessinger*, 166, 176 (8).
5. *Appointment of Administrator.—Duty of Court.—Statutes.*—Under §2742 Burns 1908, Acts 1901 p. 281, on the filing of a petition and application for the removal of an administrator and the granting of letters to the petitioners jointly, it became the duty of the court to examine the applicants and such other persons as it deemed necessary, touching their qualification for such appointment. *Curry v. Plessinger*, 166, 174 (5), 175 (5).
6. *Appointment of Administrator.—Refusal of Joint Application.—Discretion of Court.*—The sworn petition and application for the removal of an administrator and the granting of letters to the petitioners jointly, are insufficient to show an abuse of discretion by the court in refusing to grant letters on such joint application. *Curry v. Plessinger*, 166, 173 (3).
7. *Refusal of Joint Application.—Appeal.*—Where there was no evidence in the record, no available error was presented by assignments of errors based on the court's refusal to grant letters of administration on a joint application therefor and on its refusal to revoke letters previously granted. *Curry v. Plessinger*, 166, 173 (2).
8. *Letters of Administration.—Revocation.*—Where letters of administration have been issued contrary to the provisions of the statute, they may be revoked by the court of its own motion, or on the application of any person interested, or upon the suggestion of an *amicus curiae*. *Curry v. Plessinger*, 166, 176 (7).
9. *Removal.—Collateral Attack.—Presumption.*—The order or judgment of a court removing an administrator will be presumed to be correct as against collateral attack. *Craven v. State, ex rel.*, 30, 34 (3).

FELLOW SERVANTS—

See **MASTER AND SERVANT**.

FINDINGS—

See TRIAL 41-46.

FRATERNAL INSURANCE—

See INSURANCE 1-3.

FRAUD—

See SALES 10.

1. *Presumptions.*—Under §7483 Burns 1908, §4924 R. S. 1881, fraud will not be presumed nor inferred, but is a question of fact that must be proved as other questions of fact, and, when averred, must be proved and found.
Wills v. Mooney-Mueller Drug Co., 193, 199 (3).
2. *Fraudulent Sales.—Consideration.—Relief to Creditors.—Findings.*—Where relief is granted to creditors affected by a fraudulent sale, even in a case where the consideration represents full value, the finding must be within the issues tendered by the complaint.
Wills v. Mooney-Mueller Drug Co., 193, 200 (6).
3. *Fraudulent Representations.—Opinion.—Statement of Fact.—Question for Jury.*—In an action to recover for fraudulent representations made in an exchange of property, it was for the jury to determine under proper instructions, whether the representations made as to the value of the property were merely the expressions of an opinion or affirmation of facts to be relied upon.
New v. Jackson, 120, 129 (8).
4. *Fraudulent Representations as to Value of Property.—Effect.*—Where a vendor knows that a vendee is wholly ignorant of the value of the property and is relying upon the vendor's representation as to its value, and such representation is made, not as a mere expression of opinion, but as a statement of fact known by the vendor to be untrue, such a statement is a representation by which the vendor is bound.
New v. Jackson, 120, 129 (7).
5. *Elements.—Knowledge That Representations Are False.—Instructions.*—It is not a necessary element of fraud that one making representations has knowledge that they are false, and, in an action to recover damages for fraud perpetrated in exchange of property, instructions which told the jury that before plaintiff was entitled to recover he must show that the representations charged were made for the fraudulent purpose of inducing plaintiff to make the trade in question, were not erroneous for failure to include that plaintiff must show that defendant knew the representations to be false.
New v. Jackson, 120, 124 (4).

FRAUDS, STATUTE OF—

1. *Parol Lease.—Validity.*—A lease for one year is valid without being reduced to writing.
Boggs v. Toney, 289, 291 (3).
2. *Contracts.—Memorandum.—Evidence.*—Written evidence is the only character of evidence admissible to establish a contract governed by the statute of frauds, and a written memorandum introduced in evidence is sufficient to establish the terms of such a contract regardless of whether it was made before or after the contract was performed.
Smith v. Hund, 592, 599 (6).
3. *Parol Lease.—Breach.—Instruction.*—In an action for breach of a parol lease for the term of one year, an instruction which told the jury that, if it found the agreement to have been entered into and that there was a breach thereof, as alleged in the

FRAUDS, STATUTE OF—Continued.

complaint, it should find for the plaintiff, was not erroneous for stating that it was not material whether such agreement was to be reduced to writing or to rest in parol.

Boggs v. Toney, 289, 291 (5).

FRAUDULENT REPRESENTATIONS—

Fraud in Exchange of Property.—Action for Damages.—Instructions.—Instruction Embodying Complaint.—Objection That Complaint Omits a Material Allegation.—In an action for damages for fraud perpetrated in an exchange of property, where an instruction given by the court contained the allegations of the complaint set out in detail, and told the jury that the complaint and the general denial formed the issue it was to try, and was followed by a further instruction that under the issue thus formed the plaintiff was required to prove all of the material averments of the complaint by a fair preponderance of the evidence, and where such complaint alleged in detail the representations made by defendants as to the quality, character, productivity and value of the farm and other property which defendant traded to plaintiff, and alleged that defendant referred plaintiff to persons whom he had procured to make the same representations, all of which representations were false and upon all of which plaintiff relied, such instructions were not open to the objection that, as to the value of the property at the time defendant traded same to plaintiff, the complaint contained no averment the proof of which would entitle plaintiff to recover.

New v. Jackson, 120, 127 (6).

GAS—

Lease, see COVENANTS; MINES AND MINERALS 1-4.

GUARANTY—

1. *Delivery of Instrument.—Possession.*—Possession of a written guaranty by the party in whose favor it is made is *prima facie* evidence of its delivery.

Goldsmith v. First National Bank, 11, 21 (12).

2. *Drafts.—Guaranty of Payment.—Burden of Proof.*—Before a recovery can be had by plaintiff in an action for money advanced on an unaccepted draft pursuant to the drawee's guaranty of payment, it must establish the execution and delivery of such guaranty by a fair preponderance of the evidence.

Goldsmith v. First National Bank, 11, 21 (10).

GUARDIAN AND WARD—

See INSANE PERSONS 1, 2.

HARMLESS ERROR—

See APPEAL.

HEARSAY EVIDENCE—

See DEATH 5-7.

Admissible to prove pedigree, see EVIDENCE 2, 3.

HIGHWAYS—

1. *Opening.—Payment of Damages.—“Judgment”.*—An allowance of damages by the board of county commissioners on ordering the opening of a highway, is not a judgment against the county

HIGHWAYS—Continued.

rendered by a court having jurisdiction of the subject-matter of the action and of the parties within the meaning of §5944 Burns 1908, §27 Acts 1899 p. 343, so as to become a binding obligation without a previous appropriation. *Lortz v. Davis*, 337, 346 (3).

2. *Opening.—Payment of Damages.—Void Order.—Authority of Auditor and Treasurer.*—A final order of the board of county commissioners for the opening of a highway and the payment of damages awarded, made at a time when there was no money in the county treasury available for the purpose, will not authorize the auditor of the county to issue a warrant, nor the treasurer of the county to pay same if issued, and in the event of a payment under such circumstances the money may be recovered from those to whom it was paid, under the provisions of §5962 Burns 1908, Acts 1899 p. 343, §45. *Lortz v. Davis*, 337, 345 (2).
3. *Opening.—Payment of Damages.—Authority of Board of Commissioners.—Void Action.—County Reform Law.*—Under the provisions of §§5936, 5937, 5938, 5939, 5942, 5943, 5944 Burns 1908, §§19, 20, 21, 22, 25, 26, 27 Acts 1899 p. 343, requiring the board of county commissioners to make estimates of their proposed expenditures by items separate from each other, providing for the making of appropriations by the county council, prohibiting the making of any expenditure out of the county treasury, except in certain cases, unless an appropriation therefor has been made and is not exhausted, prohibiting the making of any contract or the doing of any thing to bind the county contrary to the provisions of the act, and prescribing a penalty, the board of county commissioners has no authority, in the absence of an appropriation for that purpose, to order the payment out of the county treasury of damages awarded on account of the opening of a highway, and a final order for the opening of a highway, made at a time when there was no money in the county treasury available for the purpose of paying the damages allowed is void. *Lortz v. Davis*, 337, 341 (1), 346 (1).

HUSBAND AND WIFE—

1. *Purchases by Wife.—Agency.—Cohabitation.*—Cohabitation furnishes merely a strong presumption of the wife's authority to make purchases as the agent of her husband. *Cooper v. Haseltine*, 400, 407 (3).
2. *Purchases by Wife.—Liability of Husband.*—The liability of the husband at common law on contracts made by the wife for articles suitable to her station in life, rests on the principle of the wife's agency. *Cooper v. Haseltine*, 400, 406 (1).
3. *Purchases by Wife.—Ratification.*—The husband's ratification of an unauthorized purchase made by the wife may be shown by the fact that the wife, in the husband's presence, wears the articles purchased and he does not object. *Cooper v. Haseltine*, 400, 407 (4).
4. *Purchases by Wife.—Liability of Husband.—Agency.—Question of Fact.*—Where goods purchased by a wife are the bare necessities of life, the husband's liability therefor is absolute, but for other articles it is a question of fact whether, under all the circumstances, there was an authority, express or implied, for the wife to purchase the articles as her husband's agent, or, if purchased without authority, whether he subsequently ratified the same. *Cooper v. Haseltine*, 400, 406 (2).

HUSBAND AND WIFE—Continued.

5. *Purchases by Wife.—Agency.—Ratification.—Sufficiency of the Evidence.*—In an action for the price of jewelry purchased by defendant's wife, evidence showing cohabitation at the time of the purchase, that the defendant had promised to purchase jewelry for his wife, and had told her that his credit was good and to get anything she wanted, that when informed by plaintiff of his wife's purchase defendant said that it was all right, but not to sell her any more, and that the wife wore the articles in defendant's presence many times without objection, was sufficient to show either previous authority to the wife to make the purchase, or defendant's subsequent ratification thereof.
Cooper v. Haseltine, 400, 407 (5).
6. *Purchases by Wife.—Necessities.—Question of Fact.*—In an action to recover from the husband for the price of goods purchased by the wife, it is a question of fact as to what are the means and station in life of defendant and his wife, and as to whether the goods purchased are suitable to such means and station, so as to be classed as necessities for which the husband is liable.
Cooper v. Haseltine, 400, 407 (6).
7. *Action for Price of Goods Purchased by Wife.—Complaint.—Sufficiency.*—A complaint for the price of goods sold to defendant's wife need not deny that the wife has otherwise been supplied with articles of the character purchased, such fact being a matter of defense.
Cooper v. Haseltine, 400, 409 (9).
8. *Action for Price of Goods Purchased by Wife.—Complaint.—Allegation as to Agency.*—An allegation, in a complaint for the price of goods sold to defendant's wife, that she was the purchaser for her husband, is a sufficient averment that she was his authorized agent in making such purchase.
Cooper v. Haseltine, 400, 409 (10).
9. *Action for Price of Goods Purchased by Wife.—Liability of Husband.—Complaint.—Averment as to Agency.*—A complaint alleging that defendant's wife purchased on his credit and in his name articles necessary to, and in keeping with, her means and station in life, was sufficient without an averment that the purchase was made by her as the agent of her husband, as there is a legal presumption of such agency.
Cooper v. Haseltine, 400, 409 (8).
10. *Action for Price of Goods Purchased by Wife.—Necessities.—Complaint.—Sufficiency.*—In an action for the price of jewelry sold to defendant's wife, a paragraph of complaint alleging that at the time of the purchase the defendant was wealthy and worth \$200,000 or more, and that to enable his wife to properly appear in the society of those with whom she associated it was necessary for her to have and purchase a diamond stud, brooch, watch and other jewelry of the value of \$246, which she purchased of the plaintiff, was sufficient to charge defendant with liability for the amount of the purchase, since, under modern conditions, such articles are suitable to the station in life of a woman whose husband is of the financial and social standing of defendant.
Cooper v. Haseltine, 400, 408 (7).

INJUNCTION—

1. *Mandatory Injunctions.—When Will Be Granted.*—Mandatory injunctions will be granted only to prevent serious damage, and to obtain such relief the complainant must make out a clear case.
Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 514 (8).

INJUNCTION—Continued.

2. *Grounds.—Improper Use of Drain by Municipal Corporation.*—Where a city was entitled to use a public ditch for the drainage of the surface water from its streets and alleys, its wrongful use thereof as an outlet for sanitary sewage will not be enjoined, where it does not appear that any of the plaintiffs have suffered, or will suffer any serious loss or inconvenience by reason of such use for which there is no adequate remedy at law.

Geiger v. Town of Churubusco, 685, 691 (4).

3. *Timber Contract.—Interference with Rights.—Parties.*—In a suit to restrain a grantee of land from interfering with rights acquired by plaintiffs under a timber contract executed between plaintiffs and the grantor prior to the conveyance, and of which the grantee had notice, where it does not appear from the complaint that the grantor owned or was asserting any interest in the land at the time the action was brought, such grantor was not a necessary party defendant.

Young v. Waggoner, 202, 205 (1).

4. *Timber Contract.—Defective Description of Land.—License to Cut and Saw Timber.—Complaint.—Sufficiency.*—In a suit to restrain a grantee of land from interfering with rights acquired under a timber contract, where the complaint averred that the consideration for the contract had been paid, that plaintiffs had entered into possession under its terms, and that the interest of such grantee in the land was acquired with full notice of plaintiffs' rights, an irrevocable license to cut and saw the timber was shown, and the complaint was sufficient, although the description of the land in such contract may have been insufficient to convey an interest in real estate.

Young v. Waggoner, 202, 205 (2).

IN PAIS—

Estoppel, see ESTOPPEL 3; *Steele v. Michigan Buggy Co.*, 635, 642 (10.)

INSANE PERSONS—

1. *Action by Guardian.—Evidence.—Record of Adjudication of Insanity.*—In an action by the guardian of an insane ward to recover for injuries sustained by the ward, the probate order book showing the adjudication of the mental unsoundness of plaintiff's ward was competent to prove plaintiff's authority to bring the suit.

Cleveland, etc., R. Co. v. Federle, 147, 157 (11).

2. *Action by Guardian.—Evidence.—Record of Adjudication of Insanity.—Admission.—Objection.*—In an action by the guardian of an insane ward to recover for injuries sustained by the ward, where defendant objected to the admission of the probate order book showing the adjudication of the mental unsoundness of plaintiff's ward on the ground that the record was not competent evidence because defendant was not a party to the proceedings and that, if it was admitted in evidence, parol evidence of the mental condition of the ward could not be received, but admitted that the record was competent evidence to prove the authority of plaintiff to bring the suit, the objection was properly overruled.

Cleveland, etc., R. Co. v. Federle, 147, 157 (12).

INSOLVENCY—

See CORPORATIONS 2, 4; *Haskell v. Gardner*, 1, 3 (2) (3).

INSTRUCTIONS—

See TRIAL 9-35.

See FRAUD 5; *New v. Jackson*, 120, 124 (4).

INSURANCE—

1. *Fraternal Insurance.—Right to Change By-laws.*—Fraternal societies cannot amend their by-laws so as to impair or modify contracts of insurance previously made.
Court of Honor v. Rausch, 161, 164 (2).
2. *Fraternal Insurance.—Contract.—Compliance With Future By-laws.—Construction.*—Compliance with future by-laws, as used in an agreement, in the application for membership in a fraternal insurance order, that the applicant will comply with the laws and rules of the order then in force and which may thereafter be adopted, has reference to future by-laws pertaining to the duties of the members, but not affecting the rights granted by virtue of the contract of insurance. *Court of Honor v. Rausch*, 161, 165 (3).
3. *Fraternal Insurance.—Change of By-laws.—Effect.*—Where a fraternal society issued a certificate of insurance to one of its members, providing for the payment of a designated and certain sum and providing that the certificate should be incontestable after two years, the society could not, on the death of the member by suicide more than five years thereafter, avoid its liability for the full amount of the certificate by reason of a by-law, adopted less than two years after the certificate was issued, providing that death by suicide would fix the amount payable on the certificate at five per cent per annum for each year of membership.
Court of Honor v. Rausch, 161, 164 (1).
4. *Life Insurance.—Execution of Contract.—Failure to Deny Under Oath.*—In an action on a life policy, the execution of the contract must be taken as admitted, where defendant fails to deny its execution under oath.
Commercial Life Ins. Co. v. McGinnis, 630, 633 (4).
5. *Life Insurance.—Presumption of Death.—Findings.*—A finding for plaintiff, in an action on an insurance policy, based on a paragraph of complaint counting on the absence of the assured from his usual place of residence for the space of five years, is contrary to law. *Metropolitan Life Ins. Co. v. Lyons*, 534, 538 (3).
6. *Life Insurance.—Incontestable Clause.*—Where a life policy contained a clause making it incontestable after one year from date of issue, except for certain specific causes, the insurer cannot after the expiration of such time avoid the policy for causes not included within the exception.
Commercial Life Ins. Co. v. McGinnis, 630, 633 (5).
7. *Life Insurance.—Complaint.—Exhibit.—Application Referred to in Policy.*—A complaint to recover on a policy of life insurance, where the application is made a part of the policy by reference, is not insufficient for the reason that such application is not made a part of the complaint.
Commercial Life Ins. Co. v. McGinnis, 630, 631 (1).
8. *Life Insurance.—Death of Assured.—Evidence.—Sufficiency.*—Evidence, in an action on a life policy, showing that the insured, who was unmarried, had lived with his sister for about three years and that shortly after taking out the policy in suit for her benefit, he went to a distant city where he obtained employment, that the sister received letters from him regularly for a little more than a year, after which she received no further letters,

INSURANCE—Continued.

but not showing anything as to his character, habits, affections, business or objects in life, although sufficient to raise the presumption of death after a lapse of seven years, was insufficient to warrant the court in finding the death of the insured as a fact within that period.

Metropolitan Life Ins. Co. v. Lyons, 534, 541 (7).

9. *Life Insurance.—Rebate.—Knowledge of Agent.*—Knowledge on the part of an authorized agent of a life insurance company that he was giving to the insured a rebate on his first premium, is binding notice on the company.

Commercial Life Ins. Co. v. McGinnis, 630, 632 (2).

10. *Life Insurance.—Rebates.—Validity of Policy.*—Where an authorized life insurance agent rebated the insured's first premium and delivered the policy as if the premium had been paid in full, there being at the time no law against rebating, the company cannot take advantage of such rebating to defeat the contract.

Commercial Life Ins. Co. v. McGinnis, 630, 632 (3.)

INTENT—

Of testator must be given effect, see **WILLS** 2.

INTERROGATORIES—

Answers to, see **TRIAL** 38, 39.

INTERURBAN RAILROADS—

See **MASTER AND SERVANT**; **RAILROADS** 13-22.

INTOXICATING LIQUORS—

1. *Unlawful Sales.—Action for Damages.—Instructions.—Issues.*—In an action on the bond of a saloon-keeper for damages resulting from the unlawful sale of liquor, where no issue was tendered denying the execution of the bond, an instruction that proof of such execution was necessary to a recovery by plaintiffs was properly refused.

American Surety Co. v. State, ex rel., 475, 491 (17).

2. *Unlawful Sale.—Action for Damages.—Instructions.—Refusal.*—In an action on the bond of a saloon-keeper for damages resulting from the unlawful sale of intoxicating liquor, where the evidence was that the sale was not made by the saloon-keeper, but by his bartender, an instruction was properly refused which stated that before any recovery could be had by the plaintiffs, it must be shown by a fair preponderance of the evidence that the defendant saloon-keeper sold the intoxicating liquors.

American Surety Co. v. State, ex rel., 475, 491 (14).

3. *Unlawful Sales.—Action for Damages.—Instructions.—Refusal.*—Where in an action on the bond of a saloon-keeper for injury to means of support resulting from an unlawful sale of liquor to the husband and father of plaintiffs, he having been imprisoned for a homicide alleged to have been committed while he was intoxicated, it was claimed that the homicide was committed in self-defense and not as the result of such sale of liquor, an instruction was properly refused which attempted to define the law of self defense, but which omitted the element requiring a person, who invokes its aid to acquit himself of the charge of murder, to be himself without fault.

American Surety Co. v. State, ex rel., 475, 491 (16).

INTOXICATING LIQUORS—Continued.

4. *Unlawful Sales.—Action for Damages.—Instructions.*—In an action on the bond of a saloon-keeper under §8355 Burns 1908, §5323 R. S. 1881, for injury to means of support resulting from the unlawful sale of liquor, where the husband and father of the plaintiffs was imprisoned for homicide alleged to have been committed while he was intoxicated, and the defense was that the killing was in self-defense and not the result of such unlawful sale of liquor, it was proper to instruct the jury that if self-defense and the use of the intoxicating liquors unlawfully sold combined as causes impelling the killing and each operated to a material degree in bringing it about, then, if the other facts necessary to a recovery by plaintiffs are established by a fair preponderance of the evidence, plaintiffs are not precluded from recovering simply because self-defense constituted one of the causes of the homicide.

American Surety Co. v. State, ex rel., 475, 489 (12).

5. *Unlawful Sales.—Action for Damages.—Instructions.*—In an action on the bond of a saloon-keeper for injury to means of support resulting from the unlawful sale of intoxicating liquor, where the husband and father of plaintiffs had been imprisoned for homicide, an instruction that if plaintiffs' husband and father acted solely in self-defense, and that the liquor sold him did not contribute toward causing the homicide, the verdict should be for the defendant, but that the question as to whether the use of liquors sold, if any such sale was made, contributed toward causing the homicide, was for the jury to determine from all the evidence, and that any claims by the husband and father of plaintiffs that he had acted in self-defense would not necessarily preclude a finding for the plaintiffs, was not erroneous in failing to require a finding that the sale of liquor was unlawful, where that element was submitted in another instruction, nor was the instruction improper in referring to the claims of self-defense as "claims" and not as evidence.

American Surety Co. v. State, ex rel., 475, 489 (13).

6. *Unlawful Sales.—Action for Damages.—Right to Maintain Action.—Effect of Election Under Local Option Law.*—Under the provisions of §243 Burns 1908, §243 R. S. 1881, that no vested rights, or suits instituted, under existing laws shall be affected by the repeal thereof, and under §248 Burns 1908, §248 R. S. 1881, providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder unless the repealing act shall expressly so provide, a right to maintain an action on the bond of a saloon-keeper under the provisions of §8355 Burns 1908, §5323 R. S. 1881, for the unlawful sale of liquor resulting in injury to plaintiffs' means of support, is not affected by the fact that in the county in which the action accrued an election was subsequently held under the provisions of the county local option law (Acts 1908 [s. s.] p. 4) and resulted in prohibiting the sale of intoxicating liquors, even if said act could be construed as repealing the act of 1875 of which §8355 Burns 1908, §5323 R. S. 1881, is a part.

American Surety Co. v. State, ex rel., 475, 481 (5).

7. *Unlawful Sales.—Action for Damages.—Plea in Abatement.—Sufficiency.—Another Action Pending.—Answer in Bar.*—In an action brought on the relation of a wife and children against the surety on a saloon-keeper's bond to recover for injury to their means of support resulting from an unlawful sale of liquor, the

INTOXICATING LIQUORS—Continued.

liability of such surety is grounded in the saloon-keeper's liability as principal, so that a plea in abatement by the defendant surety was insufficient which alleged that such wife had instituted an action on a similar bond executed by another saloon-keeper with the defendant surety as surety thereon, and in which plaintiff alleged the same grounds for recovery as alleged in the action in which such plea was filed, and which action was pending at the time the latter cause came up for trial, and the demurrer to such plea and also a demurrer to a paragraph of answer presenting the same facts as matter in bar of the action were properly sustained. *American Surety Co. v. State, ex rel.*, 475, 481 (4).

8. *Unlawful Sales.—Sales by Different Persons.—Joint or Separate Liability.—Right to Maintain Separate Concurrent Actions.*—The basis of an action on the bond of a saloon-keeper sounds in tort, so that where unlawful sales of intoxicating liquor, made by different saloon keepers, result in a single cause of action, the wrongdoers may be proceeded against either jointly or separately, and where separate actions are brought, the same may be prosecuted concurrently until judgment, but one judgment will bar further proceedings in the other actions.

American Surety Co. v. State, ex rel., 475, 481 (3).

9. *Unlawful Sales.—Liability.—Sales by Employee of Saloon-keeper.*—In cases of injury resulting from the unlawful sale of intoxicating liquors, a liability exists on the bond of the saloon-keeper although the sale may not have been made by him in person, but by some one authorized to make sales and conduct the business generally. *American Surety Co. v. State, ex rel.*, 475, 491 (15).

10. *Unlawful Sales.—Injury to Means of Support.—Direct or Remote Results.*—The injury or damage to means of support, for which an action lies under §8355 Burns 1908, §5323 R. S. 1881, in favor of one injured in means of support by the unlawful sale of intoxicating liquor, may be the direct or remote result of such unlawful sale. *American Surety Co. v. State, ex rel.*, 475, 486 (8).

11. *Unlawful Sales.—Action for Damages.—Evidence.—Admissibility.—Pendency of Other Actions.*—In the trial of an action on the bond of a saloon-keeper for injury to the means of support of a wife and children caused by the unlawful sale of liquor, evidence that the wife had filed other actions against other saloon-keepers was properly excluded.

American Surety Co. v. State, ex rel., 475, 489 (11).

12. *Unlawful Sales.—Action on Bond of Saloon-keeper.—Facts Essential to Recovery.—Proximate Cause.*—In an action on the bond of a saloon-keeper under §8355 Burns 1908, §5323 R. S. 1881, for injury to means of support resulting from intoxication produced by liquor unlawfully sold it is essential to a recovery by plaintiff that besides the sale or gift of liquor, intoxication from its use in whole or in part and a resulting injury to plaintiff's means of support must be shown, but it is not necessary to show that the sale of liquor was the proximate cause of the injury.

Hughes v. State, ex rel., 617, 622 (3).

13. *Unlawful Sales.—Action for Damages.—Evidence.—Admissibility.*—In an action brought under the provisions of §8355 Burns 1908, §5323 R. S. 1881, on the bond of a saloon-keeper, for injury to plaintiffs' means of support by the unlawful sale of liquor to the husband and father of the plaintiffs, he having been imprisoned for a homicide alleged to have been committed while intoxi-

INTOXICATING LIQUORS—Continued.

cated, evidence of his threat to kill the decedent before morning was properly admitted in behalf of plaintiffs on the question of his intoxication, although such threat was made out of the presence of the defendants, and although he had stated, while testifying as a witness for plaintiffs, that the killing was in self-defense.

American Surety Co. v. State, ex rel., 475, 485 (7), 486 (7).

14. *Unlawful Sales.—Action on Bond of Saloon-keeper.—Intoxication.—Evidence.—Sufficiency.*—In an action on the bond of a saloon-keeper brought under §8355 Burns 1908, §5323 R. S. 1881, for injury to plaintiff's means of support resulting from the unlawful sale of liquor to plaintiff's father, where the evidence showed that the sales of liquor were unlawful, that decedent, who, when not drinking, was a peaceful and lawabiding citizen, drank approximately sixteen glasses and one bottle of beer and four drinks of whisky between nine a. m. and three p. m. of the same day, that he became noisy and quarrelsome and attempted to strike others with a bottle of beer, for which he was put out of the saloon, that from the saloon he went to a dancing platform and thence to a ball game, where he interfered in a fight and engaged in combat with the deputy marshal in which he was killed, the evidence sufficiently showed that decedent was so much intoxicated that he had lost control of himself and for that reason resisted the officer who killed him, so as to authorize a recovery by plaintiff.

Hughes v. State, ex rel., 617, 619 (2).

"INVALID"—

See WORDS AND PHRASES.

JOINT TENANCY—

Conveyance by joint tenants, see DEEDS 7.

JUDGMENT—

Form and sufficiency, see JUSTICE OF THE PEACE 6.

An order granting a new trial is a final, see APPEAL 4.

Statute providing for the opening or vacating of, is remedial in its nature and should be liberally construed, see STATUTES 1.

An allowance of damages by the board of county commissioners on ordering the opening of a highway is not a, against the county, so as to become a binding obligation without a previous appropriation, see HIGHWAYS 1; *Lortz v. Davis*, 337, 346 (3).

1. *Arrest of Judgment.—Overruling Motion.*—Where the complaint stated a cause of action against all defendants, and the verdict and judgment was against all of them, and no error appeared on the face of the record sufficient to vitiate the entire proceedings, the court properly overruled defendant's several motions in arrest of judgment.

McFerran v. Swayntie, 50, 53 (3).

2. *Modification.—Motion.—Parties.*—A motion to modify a judgment rendered on a cross-complaint, not made until the term following the term of court at which the judgment was rendered, will not lie in the absence of notice to all the parties affected by the judgment.

Bradford v. McBride, 624, 629 (2).

3. *Judgment on Cross-Complaint.—Cross-Complaint Not Confined to Matters Germane to Original Action.—Validity of Judgment.*—Although a judgment on matters outside of the issues is void, a

JUDGMENT—Continued.

judgment rendered on a cross-complaint, and which is within the issues tendered by such cross-complaint, is valid even though such issues are not germane to the original action.

Bradford v. McBride, 624, 628 (1).

4. *Application for Relief.—Excusable Neglect.—Sufficiency of Showing.—Rule.*—Where there is doubt as to the sufficiency of the showing of excusable neglect in an application for a relief from a judgment, it is better as a general rule to resolve the doubt in favor of the application.

First Nat. Bank v. Stilwell, 226, 232 (4).

5. *Setting Aside.—Excusable Neglect.*—The term “excusable neglect” as used in §405 Burns 1908, §396 R. S. 1881, providing that a party may be relieved from a judgment taken against him through his excusable neglect, is one of general application, and a determination of what constitutes excusable neglect must depend on the particular facts and circumstances of each case.

First Nat. Bank v. Stilwell, 226, 231 (2).

6. *Setting Aside Default.—Appeal.—Review.*—The judgment setting aside a default will not be reversed where there is nothing disclosed by the record showing that the substantial rights of the appellant were prejudiced thereby.

First Nat. Bank v. Stilwell, 226, 233 (7).

7. *Default.—Setting Aside.—Discretion of Court.—Appeal.*—A trial court is vested with a certain discretion in setting aside defaults, and courts of appeal are reluctant to disturb its action where such relief has been granted.

First Nat. Bank v. Stilwell, 226, 232 (6).

8. *Default.—Complaint to Set Aside.—Meritorious Defense.*—In a complaint by a married woman, under §405 Burns 1908, §396 R. S. 1881, to set aside a personal judgment taken by default against her in an action on a promissory note and to foreclose a mortgage to secure its payment, the averments that she executed the note and mortgage as surety for her husband, that she received no part of the consideration therefor and that no part thereof went to the betterment of her separate estate, show a meritorious defense that would have prevented the rendition of such judgment against her.

First Nat. Bank v. Stilwell, 226, 228 (1).

9. *Default.—Complaint to Set Aside.—Sufficiency.—Excusable Neglect.*—Where a personal judgment had been taken by default against a married woman in an action on a note and to foreclose a mortgage to secure its payment, her complaint for relief therefrom under §405 Burns 1908, §396 R. S. 1881, alleging that she had no knowledge of signing the note for the reason that her signature had been obtained by the fraud of her husband, that she signed the mortgage as surety for her husband at his request, without reading it and without any knowledge that it contained a covenant requiring her to pay the sum secured thereby, that subsequently to its execution an attorney had examined the recorded mortgage at her request and advised her that she could not be held personally responsible thereon, that after summons was served she consulted another attorney and was by him advised that no judgment could be rendered against her in the foreclosure suit which could become a lien on her individual property, was sufficient to show excusable neglect in failing to defend in the foreclosure proceeding.

First Nat. Bank v. Stilwell, 226, 231 (3).

JUDICIAL NOTICE—

Of terms of court, see EVIDENCE 4.

Result of Operation of Natural Forces.—The court knows that it is a natural result of the maintenance of a decayed and rotten post for such post to fall.

Evansville, etc., Traction Co. v. Montgomery, 528, 532 (2).

JUDICIAL POWER—

Where the language in a deed is not uncertain, the contract as expressed must be enforced as made, although in the opinion of the court, it may seem in some respects inequitable, see DEEDS 8; *Ragle v. Dedman*, 359, 363 (6).

JURISDICTION—

Of justice in action for possession, see JUSTICE OF THE PEACE 8.

Acquired in proceeding to recount votes, how acquired, see ELECTIONS 2; *Watkins v. Forkner*, 35, 37 (1).

Superior Court has, in an action to replevy property taken on execution issued by justice of the peace, see COURTS 2; *McFerran v. Swayntle*, 50, 55 (4).

JURY—

Instruction invading province of, see CUSTOMS AND USAGES 5.

Misconduct of, see APPEAL 56; *New v. Jackson*, 120, 130 (9).

Province of, see TRIAL 33; *Rump v. Woods*, 347, 355 (9).

Question for, see MASTER AND SERVANT 24.

It is the duty of the judge to instruct the, as to matters of law, and of the jury to decide the facts of the case, see TRIAL 1.

A court may not substitute its judgment on a question of fact for the judgment of the, see TRIAL 11; *Rump v. Woods*, 347, 356 (10).

Where there is any conflict in the evidence given on a trial on the subject of contributory negligence, the decision of the issue should be submitted to the, see NEGLIGENCE 7.

Has the right to consider all the evidence, and determine its weight as applied to any issuable fact in the case, and also to consider what may be reasonably inferred from what is thus proved, see TRIAL 7.

Where appellant knew of the misconduct of the, in time to present a motion to withdraw the submission of the cause to the jury, but failed to do so, he cannot thereafter, on account of such misconduct, avoid the effect of a verdict against him, see TRIAL 2; *New v. Jackson*, 120, 131 (11).

Question for, in an action to recover for fraudulent representations made in an exchange of property, to determine under proper instructions, whether the representations made as to the value of the property were merely the expressions of an opinion or affirmation of facts, see FRAUD 3; *New v. Jackson*, 120, 129 (8).

JUSTICES OF THE PEACE—

Error in sustaining a motion to dismiss an appeal from, how presented, see APPEAL 24.

1. *Action on Bond.—Nature.—Complaint.*—An action on the bond of a justice of the peace is an action *ex contractu* and to entitle plaintiff to recover he should allege and prove a breach of some

JUSTICES OF THE PEACE—Continued.

- duty imposed by the terms of the bond upon which the suit was predicated. *Granger v. Boswinkle*, 114, 116 (1).
2. *Action on Bond.—Breach by Act of Special Constable.—Complaint.—Sufficiency.*—A complaint to recover on the bond of a justice for injuries inflicted by a special constable, was insufficient, which did not allege that the defendant justice of the peace himself made the appointment of such constable in a particular case, and that in such particular case he issued and directed to such constable the warrant under which he was acting at the time of inflicting the injury. *Granger v. Boswinkle*, 114, 117 (3).
3. *Action on Bond.—Liability for Acts of Special Constable.—Criminal Cause.*—Section 1939 Burns 1908, Acts 1905 p. 584, §71, authorizing justices of the peace to appoint special constables in criminal causes in the same manner as in civil cases, in no way provides for any liability against a justice of the peace on account of any such appointment, and there being no other statute creating a liability in such case, an action, which is predicated solely upon the acts of a special constable appointed in a criminal cause, cannot be maintained against a justice of the peace on his official bond. *Granger v. Boswinkle*, 114, 119 (4).
4. *Action on Bond.—Liability for Acts of Special Constable.*—The liability of a justice of the peace and the sureties on his official bond for the acts of a special constable in assaulting and beating another, must be predicated upon the general condition of the bond providing that the justice shall faithfully discharge his duties as such, together with the provisions of §§1727, 1728 Burns 1908, §§1439, 1440 R. S. 1881, which provide the duties and liability of a justice of the peace in the matter of appointment of a special constable. *Granger v. Boswinkle*, 114, 117 (2).
5. *Appeal to Circuit Court.—Trial De Novo.*—On appeal to the circuit court from the judgment of a justice of the peace, there is no question of correcting errors, but the cause is tried *de novo*. *Hughes v. Chicago, etc., R. Co.*, 278, 282 (4).
6. *Judgment.—Form.—Sufficiency.*—A judgment of a justice of the peace, although informal and open to criticism, is sufficient in form to evidence a judgment, where, when fairly construed, it shows a trial, a finding in favor of defendant, and a judgment that plaintiffs take nothing by their action and pay the costs of suit. *Hughes v. Chicago, etc., R. Co.*, 278, 280 (2).
7. *Judgment.—Form.—Necessity of Signature to Judgment on Appeal to Circuit Court.*—Although under §§1725, 1780 Burns 1908, §§1437, 1489 R. S. 1881, a judgment of a justice of the peace is not valid until it has been entered of record and signed, his failure to sign a judgment from which an appeal has been taken to the circuit court is not ground for dismissal of the appeal, where such appeal was otherwise regular under the statute and the transcript showed that the justice had jurisdiction and rendered a judgment. *Hughes v. Chicago, etc., R. Co.*, 278, 280 (3), 282 (3).
8. *Jurisdiction.—Action for Possession.—Landlord and Tenant.*—Under §8071 Burns 1908, §5225 R. S. 1881, a justice of the peace has jurisdiction coextensive with the territorial limits of his county, and unlimited as to amount, in an action for possession by the landlord against a tenant unlawfully holding over. *Miller v. Citizens Building, etc., Assn.*, 132, 134 (3).
9. *Jurisdiction.—Set-Off.—Counterclaim.—Amount of Demand.*—Where a set-off or counterclaim for unliquidated damages is

JUSTICES OF THE PEACE—Continued.

pleaded in an action before a justice of the peace, he has jurisdiction, if the defendant, after crediting the plaintiff's demand, does not claim more than \$200, the jurisdiction in such cases being determined by the damage claimed.

Regina Co. v. Galloway, 92, 94 (2).

10. *Execution.—Claims of Third Persons to Property Levied On.—Remedy.*—Where personal property is seized by virtue of an execution, and a person other than the execution defendant owns or has some interest in it, he may have his right thereto tried and determined, as provided by §1820 Burns 1908, §1529 R. S. 1881, by filing with the justice of the peace issuing such writ his verified complaint stating the nature of such claim, and under §1837 Burns 1908, §1546 R. S. 1881, if he is a resident of this state and fails to assert his claim within twenty days after receiving from the officer seizing the property, a notice as provided by §1836 Burns 1908, §1545 R. S. 1881, he is thereafter barred from doing so, unless before receipt of such notice, he has instituted a suit to assert his right. *McFerran v. Swaynie*, 50, 52 (1).

LANDLORD AND TENANT—

Justice of the peace has jurisdiction coextensive with the territorial limits of his county, and unlimited as to amount in an action for possession by the landlord against a tenant unlawfully holding over, see JUSTICE OF THE PEACE 8.

1. *Lease.—Surrender.—Consideration.*—An express surrender of a lease is usually required to be in writing, and must be supported by a consideration. *Powell v. Jones*, 493, 496 (2).
2. *Lease.—Agreement of Sale.—Validity.*—A lease contract containing a provision for the sale of the premises to the tenant may be enforced. *Miller v. Citizens Building, etc., Assn.*, 132, 135 (5).
3. *Lease.—Forfeiture.—Construction.*—A provision for the forfeiture of a lease on failure to pay rent is a sort of condition subsequent, and is strictly construed. *Templer v. Muncie Lodge, etc.*, 324, 329 (6).
4. *Lease.—Termination.—Death of Lessor.*—Where the covenant in a lease for the payment of rent is general, without being made payable to any particular person, the lease does not terminate on the death of the lessor. *Powell v. Jones*, 493, 501 (11).
5. *Lease.—Construction.*—A lease is construed in the light of the statutes on the subject of landlord and tenant (§8053 *et seq.* Burns 1908, §5207 *et seq.* R. S. 1881) which are regarded as if written into and constituting a part of the contract. *Templer v. Muncie Lodge, etc.*, 324, 328 (1).
6. *Lease.—Surrender by Operation of Law.*—A surrender of a lease arises by operation of law on the doing of some act by the parties that is so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. *Powell v. Jones*, 493, 496 (3).
7. *Lease.—Termination.*—A lease for a specified term will continue until the expiration of the time named, unless it is sooner terminated in accordance with the provisions of the statutes, or in accordance with some provision of the lease itself, or by agreement of the parties. *Templer v. Muncie Lodge, etc.*, 324, 328 (2).

LANDLORD AND TENANT—Continued.

8. *Lease.—Termination.—Rent Payable in Advance.—Statutes.*—Under §8059 Burns 1908, §5213 R. S. 1881, where a lease provides for payment of rent in advance, a failure to pay the rent in advance when due terminates the lease at the election of the lessor, and he may bring an action for possession without notice and without demand for either the rent or possession.
Templer v. Muncie Lodge, etc., 324, 328 (3), 329 (3).
9. *Lease.—Termination.—Rent Not Payable in Advance.—Notice.*—Where a lease contains no provision for the payment of the rent in advance, and does not provide a forfeiture for such failure, a failure to pay does not *ipso facto* terminate the lease, but it will terminate by operation of §8057 Burns 1908, §5211 R. S. 1881, in case the rent is not paid within ten days after giving notice as therein provided. *Templer v. Muncie Lodge, etc.*, 324, 328 (4).
10. *Lease.—Termination.—Provision for Forfeiture.—Rent Not Payable in Advance.—Demand.*—Where the rent is not payable in advance under a lease providing for a forfeiture for failure to pay the rent when due, the lessor may declare a forfeiture under the terms of the lease after first demanding the rent upon the leased premises, unless some other place of payment is stipulated, just before sunset on the day the rent is due.
Templer v. Muncie Lodge, etc., 324, 329 (5).
11. *Lease.—Estoppel of Landlord to Claim Forfeiture for Non-payment of Rent.*—Where the conduct of a lessor is such as to be reasonably calculated to induce the lessee to believe that he will not insist on the forfeiture of the lease for failure to pay rent when it becomes due, and the lessee by reason thereof, does so believe in good faith, and relying thereon suffers a default to occur when otherwise he would not have done so, the lessor will be estopped from asserting the right to terminate the lease on account of such default.
Templer v. Muncie Lodge, etc., 324, 334 (10).
12. *Lease.—Waiver of Forfeiture.—Answer.—Sufficiency.*—In an action for possession of leased premises for failure to pay rent, where the answer admitted the possession under a lease providing a forfeiture for failure to pay the rent monthly in advance and admitted the nonpayment of the rent due on each the first days of March and April immediately preceding the time of demanding possession, but averred that plaintiff had never theretofore, during the entire period of the lease, demanded payment monthly in advance and that defendant had never paid the rent monthly in advance and had often delayed the payment for a period of three months or more, and that by reason of plaintiff's acceptance of such payments defendant had been led to believe that plaintiff would not insist upon a forfeiture for failure to pay monthly in advance, the allegations were insufficient to show a waiver of plaintiff's right to terminate the tenancy for failure to pay the rent admitted to be due.
Templer v. Muncie Lodge, etc., 324, 330 (7), 333 (7).
13. *Liability for Rent.—Privity of Contract.—Privity of Estate.*—The liability for the payment of rent may be created either by privity of contract or by privity of estate.
Powell v. Jones, 493, 497 (4).
14. *Liability for Rent.—Sub-lessee.*—An agreement between a lessee and his sub-lessee as to the payment of rent is enforceable

LANDLORD AND TENANT—Continued.

only by the lessee and does not create a privity of contract between such sub-lessee and the lessor.

Powell v. Jones, 493, 499 (8).

15. *Liability for Rent.—Tenant Never in Possession.*—A tenant under an agreement which is absolute to pay rent is not relieved from his liability by the fact that he has never personally taken possession of the premises, if he was not prevented from so doing by the lessor.

Powell v. Jones, 493, 499 (9).

16. *Liability for Rent.—Surrender of Lease.*—To relieve a lessee from liability for rent during the term of a lease, it must appear that there was either an express surrender of the lease by agreement between the parties that it should cease to be binding, or that a surrender was created by operation of law.

Powell v. Jones, 493, 496 (1).

17. *Liability by Privity of Estate.—Surrender.*—Where the liability of a tenant results from privity of estate, and this privity is broken by the tenant's assignment of the lease with the consent of the landlord and the latter's acceptance of rent from the assignee, a surrender arises by operation of law.

Powell v. Jones, 493, 497 (5).

18. *Liability for Rent.—Privity of Contract.—Assignment of Lease.*—Where the liability for payment of rent arises by privity of contract, the acceptance of rent by the lessor from an assignee or sub-lessee, and a mere agreement to receive him as tenant, merely indicates that the privity of estate is ended and does not relieve the lessee from liability for rent, unless it further appears that such assignee or sub-lessee was substituted in the place of the original lessee with intent of the parties to the demise to annul its obligations.

Powell v. Jones, 493, 498 (6).

19. *Liability for Rent.—Release of Lessee.—Evidence.—Sufficiency.*—In an action against the original lessee for rent, evidence showing that defendant never personally took possession of the premises, but formed a partnership before the beginning of the term and told the lessor that the firm would take possession of the premises, that lessor said it was all right and gave the firm leave to take possession and received the rent from the firm until her death, that thereafter her executors received the rent, that on defendant's retirement from the firm he notified the executors of that fact and that the premises were in the possession of a new firm, that one of the executors said it was all right and never demanded rent of defendant, but was received from the new firm, was not sufficient to show an intention on the part of the lessor, or her successors under the lease, to discharge defendant from his obligations under the instrument and to substitute in his stead any of the various tenants from whom rent was collected.

Powell v. Jones, 493, 499 (7).

20. *Forfeiture of Lease.—Estoppel of Landlord.—“Cross-complaint”.—Sufficiency as Defense.*—A pleading filed by defendant in an action for possession of premises for default in payment of rent, which contained averments sufficient to show that plaintiff was estopped from terminating the tenancy because of such default, was sufficient to constitute a cause of defense, although it was designated as a cross-complaint.

Templer v. Muncie Lodge, etc., 324, 335 (12).

21. *Forfeiture of Lease.—Estoppel of Landlord.—Answer.—Sufficiency.*—An answer showing a course of conduct by plaintiff well

LANDLORD AND TENANT—Continued.

8. *Lease.—Termination.—Rent Payable in Advance.—Statutes.*—Under §8059 Burns 1908, §5213 R. S. 1881, where a lease provides for payment of rent in advance, a failure to pay the rent in advance when due terminates the lease at the election of the lessor, and he may bring an action for possession without notice and without demand for either the rent or possession.
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21. *Forfeiture of Lease.—Estoppel of Landlord.—Answer.—Sufficiency.*—An answer showing a course of conduct by plaintiff well

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calculated to mislead defendant and cause him to believe that plaintiff did not at any time intend to insist on its right to terminate the lease for failure to pay rent when due, and averring that defendant did so believe, was insufficient on the ground of estoppel for failure to aver that defendant's default was due to a reliance in the belief thus induced.

Templer v. Muncie Lodge, etc., 324, 335 (11).

- 22. Conveyance of Leased Premises.—Rents.—Rights of Grantee.**
—Where leased premises are sold and conveyed, future rents under the existing lease are due and payable to the grantee in the absence of a stipulation to the contrary.

Powell v. Jones, 493, 500 (10).

- 23. Death of Lessor.—Sale of Lease.—Action for Rent.—Evidence.**
—*Admissibility of Executors' Report of Sale.*—Where, on the death of a lessor, the lessor's interest in a lease of her premises was sold by executors of her will, the report of such executors showing such sale and the action of the court in approving the same, was competent evidence in an action by the purchaser against the lessee for the recovery of rent due.

Powell v. Jones, 493, 501 (12).

- 24. Lease.—Agreement of Sale.—Construction.—Relation of Landlord and Tenant.**—A contract, drawn in the form and language common to all lease contracts, with the exception that it contains a provision for a sale and conveyance to the party taking possession by virtue thereof, upon his full compliance with its provisions, is in effect a lease creating the relation of landlord and tenant between the parties thereto.

Miller v. Citizens Building, etc., Assn., 132, 135 (6).

LAW OF THE CASE—

See **APPEAL** 101-104.

LEASE—

See **LANDLORD AND TENANT** 1-12.

LEASES—

Gas, see **MINES AND MINERALS**.

Parol, for one year valid without being reduced to writing, see **FRAUDS, STATUTE OF** 1; *Boggs v. Toney*, 289, 291 (3).

LICENSES—

Revocation.—Consideration.—Restoration.—Necessity.—Although at common law a mere license to enter on real estate is revocable at the pleasure of the licensor, on principles of equity the licensor, or, in the event of a conveyance, the grantee with notice, is estopped from revoking a license after it has been acted on and money has been expended on the faith thereof, without placing the licensee in *statu quo*.

Young v. Waggoner, 202, 205 (3).

LIFE INSURANCE—

See **INSURANCE** 4-10.

LIMITATION OF ACTIONS—

1. *Part Payment.—Effect.*—A voluntary part payment on a debt is *prima facie* sufficient to revive the debt, but such *prima facie* case may be rebutted by attendant circumstances inconsistent with such revivor.
Barrett v. Sipp, 304, 310 (2).
2. *Part Payment.—Evidence.*—To recover on a debt claimed to have been taken out of the statute of limitations by a part payment, it must be shown that the payment was made on account of the debt for which the action is brought.
Barrett v. Sipp, 304, 310 (4).
3. *Part Payment.—Payment of Interest.*—A payment of interest like a part payment of the principal on a debt barred by the statute of limitations, will operate as an acknowledgment of the obligation from which a promise to pay may be implied.
Barrett v. Sipp, 304, 310 (3).
4. *Complaint.—Amendment Operating to Defeat Statute.*—An amendment to a complaint will not be permitted when it will operate to defeat the statute of limitations.
Indiana Union Traction Co. v. Pring, 566, 575 (1).
5. *Accrual of Cause.—Administrator's Bond.*—Where the final settlement of an administrator is set aside and he is ordered by the court to file a new report and to pay into court for distribution the balance in his hands as such administrator, and he fails to comply with such order, and is removed by the court for such failure, the statute of limitations, as against a cause of action predicated on such breach of his bond, begins to run from the time of his removal by the court.
Craven v. State, ex rel., 30, 34 (2).
6. *Action for Negligence.—Complaint.—Amendment.—Amendment Not Amounting to Independent Charge of Negligence.—Effect.*—In an action for injuries to an interurban railway motorman, where the complaint charged that on the day of the injury it was cold, sleeting, raining, lightning, freezing, foggy, dark and cloudy and that ice was frozen on defendant's telephone wires so that they were useless in directing the movement of defendant's cars, that defendant's trainmaster, knowing such fact and knowing that plaintiff was then engaged on a south bound car somewhere between two sidings, manned a car with a crew and himself acting as motorman thereon caused the same to proceed northbound as a wild car without a schedule, that carelessly and negligently failing to inform the train dispatcher of his act he proceeded with said car to a point where defendant's double track merged into a single track, where, for the first time, he attempted to notify the dispatcher by telephone that he had ordered out said wild car, and being unable to communicate with the dispatcher because of the useless condition of the wires, he negligently ordered and directed the car to continue on its journey northward along the single track, thereby causing a collision in which plaintiff was injured, that part of the complaint descriptive of the condition of the wires having been inserted by way of amendment after the expiration of the time limited for the commencement of a new action, was not for that reason subject to a motion to strike out, since such matter did not amount to an independent charge of negligence as a proximate cause of the injury, but simply gave character and degree to the charge of negligence in ordering or taking out the wild car under the existing circumstances.
Indiana Union Traction Co. v. Pring, 566, 575 (2).

LOAN—

Of stock, see **BAILMENT** 1, 2.

MAINTENANCE—

Of equipment duty of street railroad company, see **STREET RAILROADS** 1.

MANDATORY INJUNCTION—

Will be granted only to prevent serious damage, and to obtain such relief the complainant must make out a clear case, see **INJUNCTION** 1.

MASTER AND SERVANT.

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| I. THE RELATION, 1-6. | (c) FELLOW SERVANTS, 20-21. |
| II. MASTER'S LIABILITY TO SERVANT. | (d) ASSUMPTION OF RISK, 22. |
| (a) NATURE AND EXTENT IN GENERAL, 7-12. | (e) CONTRIBUTORY NEGLIGENCE, 23, 24. |
| (b) WORKS, WAYS AND MACHINERY, 13-19. | III. ACTIONS, 25-28. |

I. THE RELATION.

1. *Railroads.—Regulation of Employment.—Duty to Adopt Rules.*—It is the duty of a railroad company to adopt and promulgate reasonable rules for the running of its trains and the safety of its employes. *Chicago, etc., R. Co. v. Hamerick*, 425, 441 (11).
2. *Duty of Master.*—The master must not expose his servants, while conducting his business, to perils or hazards which may be provided against by the exercise of due care and proper diligence on the part of the master.
Indiana Union Traction Co. v. Pring, 566, 583 (12).
3. *Injury to Servant.—Duty of Master.—Safe Materials and Appliances.*—The duty of the master to provide safe materials and appliances is a continuing one and cannot be delegated to an employe in such a manner as to relieve the master from responsibility.
Federal Cement Tile Co. v. Korff, 608, 613 (2).
4. *Acts of Servant Within Scope of Authority.—Liability.*—When an employe acts as and for the master, and acts within the scope of his authority, he binds his master the same as if the master had himself acted, and when a master delegates to a servant the performance of a duty which rests on the master alone, he is liable for the manner in which it is performed.
Indiana Union Traction Co. v. Pring, 566, 583 (13).
5. *Negligence.—Vice-Principal Performing Duties of Servant.*—Where a vice-principal undertakes to perform for the master the duties and service of the servant, he at the time having authority so to do, his negligence in performing such service is the negligence of a coservant, but if he acts in his capacity of vice-principal, and not in that of a co-laborer, the master is liable for his negligent act.
Indiana Union Traction Co. v. Pring, 566, 581 (11).
6. *Injury to Servant.—Duty of Master.—Vice-Principal.—Materials and Appliances.*—Where it was the duty of a corporation manufacturing cement roof tile to furnish one of its employes, engaged in laying tile on a roof, with tile of sufficient strength to enable him to lay the same in the usual manner without danger to himself, the placing of the metal reinforcement in the tile while in process of manufacture was the duty of the master and the em-

MASTER AND SERVANT—Continued.

ploye to whom such work was assigned, no matter what his rank or grade might be, would be a principal, and not a fellow servant so as to exempt the master from liability.

Federal Cement Tile Co. v. Korff, 608, 613 (3).

II. MASTER'S LIABILITY TO SERVANT.**(A.) NATURE AND EXTENT IN GENERAL.**

7. *Injury to Servant.—Negligence.—Negligence of Fellow Servant Contributing to Injury.—Liability.*—Where the negligent act of the master's representative is the proximate cause of an injury to a servant, the mere fact that the negligent act of a co-servant contributes to the injury will not defeat the servant's right to recover.
Indiana Union Traction Co. v. Pring, 566, 588 (15).
8. *Injury to Servant.—Interurban Railroads.—Incompetency of Vice-Principal.—Evidence.—Specific Acts.*—Where a paragraph of complaint in an action against an interurban railroad company for personal injuries proceeded on the theory of the incompetency of defendant's trainmaster, evidence of specific acts of his prior incompetency was admissible to show knowledge of his incompetency on the part of the defendant.
Indiana Union Traction Co. v. Pring, 566, 579 (8).
9. *Injury to Servant.—Interurban Railroads.—Incompetency of Vice-Principal.—Burden of Proof.—Instruction.*—In an action for injuries to an interurban railroad motorman, caused by a collision with a car being operated by defendant's general trainmaster, where the complaint proceeded on the theory of the incompetency of such trainmaster, an instruction that the burden was on defendant to show that plaintiff knew of such trainmaster's alleged incompetency was erroneous, since the burden was on plaintiff to show that he had no such knowledge.
Indiana Union Traction Co. v. Pring, 566, 590 (17).
10. *Injury to Servant.—Violation of Rules of Employment.—Abrogation of Rules.—Negligence.*—Where an employer knowingly permits his rules established to promote the safety of his employes to be habitually violated by them, such rules will be deemed to have been abrogated by his consent, and he will not be permitted to set up a violation of any such rule as contributory negligence to preclude a recovery for an injury to or the death of an employe.
Chicago, etc., R. Co. v. Hamerick, 425, 441 (13).
11. *Injury to Servant.—Negligence.—Proximate Cause.—Instruction.*—An instruction in which the jury was told that if it believed from the evidence that the defendant was guilty of the negligence charged and that the injuries complained of "were the natural consequences of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence should be regarded as the proximate cause of the injury," sufficiently embodied the factor of probability of the consequence of the negligence without the use of the word "probable," and was not erroneous.
Indiana Union Traction Co. v. Pring, 566, 589 (16).
12. *Injury to Servant.—Interurban Railroad.—Vice-Principal.—Fellow Servant.—Evidence.*—In an action by a motorman against an interurban railroad company for personal injuries, where it was shown that by the rules of defendant extra trains did not appear on the time tables and had no rights except those given

MASTER AND SERVANT—Continued.

them by the train dispatcher, and were not to be run without his orders, and that all interurban trains were required to report to him at certain sidings, and it was further shown that defendant's general trainmaster, while in full charge of the transportation department, ordered out and manned an extra car with himself acting as motorman thereon, and without notifying the train dispatcher of his intention, ordered and directed the car to proceed northbound to a siding, whence he attempted to notify the train dispatcher by telephone and, being unable to so notify the dispatcher, ordered that said car continue northbound thereby causing a collision in which plaintiff was injured, the evidence was sufficient to sustain a verdict for plaintiff, since the mere fact that such trainmaster acted as motorman did not lose him his identity as a representative of his master so as to render the negligence that of a fellow servant.

Indiana Union Traction Co. v. Pring, 566, 580 (10), 582 (10).

(B.) WORKS, WAYS AND MACHINERY.

13. *Railroads.—Negligence.—Complaint.—Allegations.—“Signal”.*—In an action against a railroad company for the death of an employe, an allegation of the complaint that the decedent was given “a signal calling him on down main track”, was not the statement of a conclusion, but such expression and others of similar import, when used in railroad business having to do with the operation of trains, are statements of fact.

Chicago, etc., R. Co. v. Hamerick, 425, 433 (2).

14. *Railroads.—Negligence.—Complaint.—Allegations.—“Duty”.*—In a complaint against a railroad company for the death of an engineer in charge of defendant's train, caused by a collision resulting from the failure of a block signal operator to give proper signals, the allegations “that it was the duty and business” of the operator to give proper signals, and that it was “the duty and business” of the decedent to obey the signals so given, were averments of ultimate facts and not mere conclusions of the pleader.

Chicago, etc., R. Co. v. Hamerick, 425, 434 (4).

15. *Injury to Servant.—Interurban Railroads.—Negligence of Vice-Principal.—Evidence.*—In an action by an interurban railroad motorman for injuries received in a collision, where it was alleged that defendant's trainmaster, without notice to the train dispatcher, ordered out a special car and directed it to proceed northbound, thereby causing the collision in which plaintiff was injured, evidence that the movement of defendant's cars was directed by means of a telephone system and that on the day of the injury such trainmaster knew that the telephone system was not in working order because of the severe weather conditions, was admissible as bearing on the character of the trainmaster's conduct and for the purpose of determining whether he was negligent in doing what he did.

Indiana Union Traction Co. v. Pring, 566, 579 (6).

16. *Railroads.—Negligence.—Complaint.—Sufficiency.*—In an action against a railroad company for the death of an employe, where the complaint averred that the decedent was an engineer in charge of one of defendant's trains and was approaching a station under orders to meet another train at that point, that he checked the speed of his engine preparatory to taking the siding when he received from the operator of defendant's block system a “signal calling him on down main track”, which he an-

MASTER AND SERVANT—Continued.

swered by sounding his whistle and then proceeded down the main track to the front of the station where the collision occurred, resulting in his death, it was not insufficient as against a demurrer for failure to aver additional facts in regard to the alleged signal, but was open to a motion to make more specific.

Chicago, etc., R. Co. v. Hamerick, 425, 434 (3).

17. *Coal Mines.—Injury to Servant.—Complaint.—Sufficiency.*—In an action to recover for the wrongful death of a coal mine employe, caused by falling rock and slate from the roof of a mine entry, where the complaint averred that decedent was employed as a "jerryman", whose duty it was to clean up loose slate, rock and debris from the various entries and rooms of the mine, to assist in putting cars on the track in the entries of the mine and to lay track in said mine and to perform any other services when ordered by the mine boss so to do, and that by reason of defendant's failure to make the roof or overhead portions of the mine safe, the injury occurred, the proximate cause of the injury is shown to have been the defendant's failure to perform its statutory duty of making the roof or overhead portions of the mine safe, and the complaint was not insufficient as against a demurrer based on the theory that it showed an assumption of risk by the decedent.

Harting v. Vandalia Coal Co., 98, 105 (5).

18. *Injury to Servant.—Action.—Evidence.—Sufficiency.*—Where the complaint, in an action against a railroad company for the wrongful death of an employe, alleged that defendant was negligent in constructing its main track and sidetrack too close together and in placing loose gravel between them, in placing cars on the side-track, and in using an oil lamp as a headlight on the engine of its passenger-train, evidence showing that the decedent, who was a brakeman on defendant's freight-train, after being ordered to flag the passenger-train, was found to have been struck and killed by the passenger-train, but which failed in any way to show that his death was caused by reason of either of the alleged negligent acts of the defendant, was not sufficient to sustain a verdict in favor of the plaintiff and a directed verdict for defendant was proper.

Bennett v. Chicago, etc., R. Co., 264, 267 (5).

19. *Injury to Servant.—Interurban Railroad.—Negligence of Vice-Principal.—Complaint.—Sufficiency.*—In an action by an interurban railway motorman for injuries in a collision with a car negligently sent out without a schedule by defendant's trainmaster, where the complaint alleged that such trainmaster had jurisdiction over the operative department throughout defendant's entire system, with authority to employ and discharge men and to decide when and under what conditions a special car should be sent out, that said trainmaster knowing the plaintiff was engaged on a southbound car somewhere between two certain sidings, and knowing the impossibility of directing the movements of defendant's cars owing to the severe weather conditions which had rendered defendant's telephone system useless for that purpose, and while carelessly and negligently failing to inform defendant's train dispatcher of his intention, manned a car with a crew and ordered said car to proceed northbound, with himself acting as motorman thereon, that on arriving at a point where defendant's double track merged into a single track, he attempted to communicate with the train dispatcher by telephone, and, being unable to do so, negligently ordered and directed said

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car to proceed on the journey northward, thereby causing the collision in which plaintiff was injured, the complaint sufficiently showed the violation of a duty owing by the trainmaster as vice-principal, and that the negligence charged was not that of a co-servant with the plaintiff.

Indiana Union Traction Co. v. Pring, 566, 578 (5).

(C.) FELLOW SERVANTS.

20. *Vice-Principal.—Fellow Servants.—Dual Capacity.—Negligence.—Liability.*—An employe of a master may at the same time be a fellow-servant and an agent or representative of the master, and when such dual capacity exists, his negligent performance of that which he is authorized to do as agent or representative of the master renders the master liable in damages for injury resulting therefrom to a servant who is himself without fault.

Indiana Union Traction Co. v. Pring, 566, 587 (14).

21. *Injury to Servant.—Interurban Railroads.—Operation.—Duty of Master.—Vice-Principal.—Negligence.—Instructions.*—In an action by an interurban railway motorman for injuries received in a collision with a wild car ordered out by defendant's trainmaster without notice to defendant's train dispatcher, and which was operated by such trainmaster himself as motorman, an instruction was not erroneous which told the jury that the ordering of the starting of its trains or cars is an absolute duty of the company and when that duty is entrusted by it to an officer or employe he in discharging the same becomes a vice-principal, for whose negligent act in that respect the company is liable to anyone, employe or otherwise, who without fault is injured thereby, and that the running and operating of its cars is not a duty of the master to the servant, that the operators on such cars are fellow servants and that the master is not liable for injury to its employes by the negligent act of a fellow servant, where the master has used care and diligence in selecting competent servants.

Indiana Union Traction Co. v. Pring, 566, 591 (19).

(D.) ASSUMPTION OF RISK.

22. *Open and Obvious Defects.—Complaint.—Negating Assumption of Risk.*—Although an employe assumes the risk from open and obvious defects and dangers, such as would be known by the exercise of ordinary care, where the complaint in an action by an employe to recover for personal injuries avers that he did not know of such defects or dangers, such averment is sufficient, as a matter of pleading, to repel knowledge either actual or constructive.

Federal Cement Tile Co. v. Korff, 608, 612 (1).

(E.) CONTRIBUTORY NEGLIGENCE.

23. *Railroads.—Duty of Employe to Obey Rules.*—Where they are brought to his notice, it is the duty of a railroad employe to obey the reasonable rules promulgated by the company for the safety of employes, and if he violates any such rule, and is injured as a proximate result thereof, he is guilty of contributory negligence and cannot recover, unless there are facts relieving him from the duty of strict obedience, or unless the rule has been abrogated.

Chicago, etc., R. Co. v. Hamerick, 425, 441 (12).

24. *Railroads.—Question for Jury.*—In an action for the death of a railroad engineer in a collision with a train standing at a station, where the decedent had proceeded down the main track with his train instead of complying with the printed rules of the

MASTER AND SERVANT—Continued.

company under an order to take the siding, and there was evidence to show that he proceeded down the main track in obedience to a signal given by the operator of defendant's block-signal system, and tending to show that it was the usual custom on defendant's road, when such signal was given a train approaching under orders to take the siding, not to go in on the switch, but to proceed on down the main track to the station for orders, and that such custom was known to and acquiesced in by defendant, it was for the jury to determine whether decedent was guilty of contributory negligence.

Chicago, etc., R. Co. v. Hamerick, 425, 445 (16), 447 (16).

III. ACTIONS.

25. *Coal Mines.—Injury to Servant.—Action.—Complaint.*—In an action by the widow of a coal mine employe against the master for the husband's wrongful death, where the theory of the complaint is that of negligence in failing to perform the duty enjoined by the statute (§8597 Burns 1908, Acts 1907 p. 253) to make the mine safe as therein specified, the complaint must state a cause of action within the provisions of the statute.

Harting v. Vandalia Coal Co., 98, 104 (3).

26. *Railroads.—Negligence.—Verdict.—Answers to Interrogatories.*—In an action for the death of a railroad engineer in a collision, where the decedent had complied with a signal to proceed down the main track instead of complying with a previous order to take the siding, answers to interrogatories which showed that rules of the company known to the decedent required him to take the siding, were not in conflict with the general verdict, where, under the issues, evidence of a custom to obey such signals and of the abrogation of the rules was admissible.

Chicago, etc., R. Co. v. Hamerick, 425, 440 (9).

27. *Railroads.—Negligence.—Abrogation of Rules.—Evidence.*—In an action against a railroad company for the death of an engineer in a collision, where the complaint alleged that the decedent was under orders to take a siding and when preparing to take the siding he received a signal from defendant's operator to take the main track, and that it was the duty of the operator to give proper signals and of the decedent to obey same, evidence that, by long usage and custom a rule was established and acquiesced in by defendant and its employes, permitting an engineer to obey such signal notwithstanding the company's printed rules or previous orders to the contrary known to him, was admissible to show an abrogation of the printed rules.

Chicago, etc., R. Co. v. Hamerick, 425, 440 (8).

28. *Railroads.—Negligence.—Complaint.—Sufficiency.*—A complaint in an action for the death of a railroad engineer in a collision with a standing train at a station, which shows a fully equipped telegraph office and block signal system at the station with an employe in charge, whose business it was to give signals, and which alleged that plaintiff's decedent approached the station under orders to meet a train there, that he checked the speed of his engine preparatory to taking the siding, when he received from the operator a signal calling him to come down the main track, that it was the duty and business of such operator to give proper signals, and of the decedent to obey the same, that decedent proceeded down the main track and his train collided

MASTER AND SERVANT—Continued.

with a train standing at the station, thereby causing his death, sufficiently complied with §343 Burns 1908, §338 R. S. 1881, requiring the facts to be stated in plain and concise language, and stated a cause of action under the fourth clause of section one of the employers' liability act (§8017 Burns 1908, Acts 1893 p. 294). *Chicago, etc., R. Co. v. Hamerick*, 425, 435 (6).

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Of previous negotiations whether oral or written upon the execution of a deed, see DEEDS 9.

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Butcher v. Greene, 692, 693 (1), 695 (1).

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MASTER AND SERVANT—Continued.

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MORTGAGES—Continued.

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5. *Security for Loan of Stock.—Construction.—Liability Secured.*—Where a mortgage recited that the mortgagee had previously loaned the mortgagor corporate stock of a certain par value and that the mortgagor had pledged said stock to secure certain of his debts, and contained the provision that it was to secure the mortgagee the return of said stock, or the payment to her of its par value, and to indemnify her against loss on account of having loaned such stock to mortgagor and his subsequent pledge thereof, such mortgage fixed a lien on the land described for the payment to mortgagee of actual damages up to the amount of the par value of such stock in the event of failure to return. *Walker v. Bement*, 645, 655 (8), 656 (8).

MOTIONS—

See PLEADING.

MUNICIPAL CORPORATIONS—

See DRAINS 1; *Geiger v. Town of Churubusco*, 685, 690 (3).

Wrongful use of public ditch for drainage will not be enjoined when, see INJUNCTION 2.

NEGLIGENCE—

See CARRIERS 3, 4, 7-11; MASTER AND SERVANT; RAILROADS; RECEIVERS; STREET RAILROADS 4, 5.

Action for, see LIMITATION OF ACTIONS 6.

1. *Elements.*—To constitute actionable negligence, there must be a duty owing by the defendant to the plaintiff, a breach of that duty, and an injury to plaintiff resulting therefrom. *Evansville, etc., Traction Co. v. Montgomery*, 528, 532 (3).
2. *Complaint.—Allegations.—Motion to Make Specific.*—Where a complaint charges that an act was negligently done, and it is desired that it should be more specific as to the duty violated, or the particular acts or omissions which constituted the violation, the defendant's remedy is by a motion to that effect. *Lake Erie, etc., R. Co. v. Beals*, 450, 454 (5).
3. *Complaint.—Allegations of Several Acts of Negligence.—Proof.*—Several charges of negligence may be embodied in one paragraph of complaint, and proof of one will be sufficient unless the acts of negligence charged are so related and dependent upon each other as to show that the injury complained of resulted from the combined acts. *Lake Erie, etc., R. Co. v. Beals*, 450, 453 (1).
4. *Proximate Cause.—Complaint.—Sufficiency.—Motion to Make Specific.*—A complaint in a negligence case averring that the negligence pleaded caused the injury complained of, without specifically showing a causal connection between the negligence

NEGLIGENCE—Continued.

and the injury, may be properly subject to a motion to make more specific, but, in the absence of such motion, is sufficient to withstand a demurrer.

Evansville, etc., Traction Co. v. Montgomery, 528, 532 (4).

5. *Use of Streets.—Presumption.*—Pedestrians in a street have a right to presume, in the absence of knowledge to the contrary, that all persons using the street are exercising ordinary care to avoid injuring them.

Rump v. Woods, 347, 352 (3).

6. *Contributory Negligence.—Question of Law.*—Where the evidence as to contributory negligence is undisputed, the question is one of law for the court.

Chicago, etc., R. Co. v. Hamerick, 425, 446 (17).

7. *Contributory Negligence.—Conflicting Evidence.—Question for Jury.*—Where there is any conflict in the evidence given on a trial on the subject of contributory negligence, the decision of the issue should be submitted to the jury.

Chicago, etc., R. Co. v. Hamerick, 425, 447 (19).

8. *Contributory Negligence.—Question for Jury.*—Where the evidence on the question of contributory negligence is of such character that a man of ordinary intelligence and honesty might draw an inference of negligence, and another of equal intelligence and honesty might draw the opposite inference, the question is one of fact for the jury and its finding will not be disturbed on appeal.

Henry v. Epstein, 660, 668 (10).

9. *Damage to Property.—Complaint.—Negating Contributory Negligence.*—In an action for damage to property caused by defendant's negligence, the complaint must allege not only that defendant was negligent, but that such negligence was the proximate cause of the accident, and that plaintiff was free from contributory negligence.

Cincinnati, etc., St. R. Co. v. Baltimore, etc., R. Co., 283, 285 (2).

10. *Automobile Accident.—Contributory Negligence.—Question for Jury.*—In an action for injuries to plaintiff by being struck by an automobile while he was attempting to walk across a street, where there was evidence that he used some care, it was for the jury to determine from the facts shown whether he exercised the care that a person of ordinary prudence would have exercised under the circumstances.

Rump v. Woods, 347, 351 (2).

11. *Automobile Accident.—Contributory Negligence.—Presumption as to Use of Street.—Consideration by Jury.*—While the wrongful conduct of the defendant in operating his automobile at an excessive rate of speed, by reason of which plaintiff was injured while crossing a street, would not excuse plaintiff from the exercise of ordinary care, the jury had a right, in determining whether from the facts shown the plaintiff was guilty of contributory negligence, to consider the presumption that defendant would use ordinary care to avoid injuring pedestrians.

Rump v. Woods, 347, 352 (4).

- 12.—*Automobile Accident.—Contributory Negligence.—Trial.—Answers to Interrogatories.*—In an action for injuries incurred in an automobile accident, where answers by the jury to interrogatories showed that plaintiff looked south just before he stepped from his wagon, and did not see defendant's automobile approaching from that direction, that he picked up two bottles of milk and stepped out upon the street while the wagon was still moving, that he did not look to the south a second time before start-

NEGLIGENCE—Continued.

ing across the street and that if he had done so he could have seen the automobile within twenty-five feet of him and could have avoided the injury, but did not show how long it was after he had looked south until he was struck, nor how far he had walked, such answers were not sufficient to overcome the general verdict on the theory that they showed contributory negligence as a matter of law, since evidence was admissible under the issues from which the jury may properly have found that plaintiff was in the exercise of ordinary care. *Rumpw. Woods*, 347, 350 (1).

13. *Automobile Accident.—Use of Streets.—Care Required of Pedestrians.*—Where a pedestrian in a street uses such care as would be ordinarily requisite to protect himself from injury by an automobile carefully operated thereon, he has discharged his full duty and is not guilty of contributory negligence, but if he has knowledge that the same is being operated in a negligent, reckless or unlawful manner, he is charged with a special duty of using such additional care as reasonable prudence dictates in view of the increased danger. *Rump v. Woods*, 347, 353 (6).

14. *Automobile Accident.—Use of Streets.—Instruction.—Harmless Error.*—Where plaintiff was injured by an automobile while he was attempting to cross a street, an instruction which told the jury that a pedestrian in a street is not guilty of contributory negligence if he fails to anticipate or take special precautions against injury by persons riding or driving at an unlawful or dangerous rate of speed, although inaccurate in not stating that a duty to use special precautions arises where the pedestrian has knowledge of the negligent or unlawful use of the street by one riding or driving thereon, was harmless in the absence of evidence showing that plaintiff prior to his injury, had any knowledge of any special or particular danger from the excessive speed of defendant's automobile. *Rump v. Woods*, 347, 353 (5).

15. *Automobile Accident.—Instructions.—Care Required in Use of Streets.*—In an action for injuries caused by an automobile while plaintiff was crossing a street, an instruction which told the jury that it is the duty of an operator of an automobile on a highway or street to avoid causing injury, erroneously stated a degree of care not imposed by the law, and the error was not cured by the latter part of the instruction stating that the duty imposed required the operator to take into consideration the character of his machine, the manner of its running, its power, whether it is operated in a populous part of the city and on a much traveled street, and from these and all other pertinent considerations to proceed with that speed and caution which reasonable care requires according to the place and the presence of other travelers and vehicles. *Rump v. Woods*, 347, 354 (7).

NEW TRIAL—

An order granting, is a final judgment from which an appeal will lie, see **APPEAL 4**; *Jones v. Kolman*, 158, 160 (3).

An assignment of error in overruling a motion for a, is waived, unless the motion or its substance is set out in appellant's brief, see **APPEAL 34**.

As to what appellant's brief should contain where the overruling of a motion for a, is assigned as error, see **APPEAL 45**; *Thompson v. Thompson*, 95, 97 (2).

NEW TRIAL—Continued.

When it appears on appeal that the ends of justice will best be served by granting a, the court will grant a new trial rather than to render judgment in favor of the appellant, see **APPEAL 14**; *Curry v. Plessinger*, 166, 167 (10).

1. *Action for New Trial.—Complaint.—Demurrer.*—The sufficiency of a complaint in an action for a new trial may be challenged by demurrer. *Jones v. Kolman*, 158, 160 (2).
2. *Grounds.—Excessive Damages.*—The provision of §585, subd. 4, Burns 1908, §559 R. S. 1881, for granting a new trial on the ground of excessive damages applies only in tort actions. *Boggs v. Toney*, 289, 290 (1).
3. *Action for New Trial.—Nature.*—An action for a new trial is an independent action, in no manner connected with the proceeding in which the judgment was rendered, and must stand or fall upon its own merits. *Jones v. Kolman*, 158, 160 (1).
4. *Motion.—Matters Properly Included.*—“*Decision Contrary to Law.*”—As a general rule matters properly included in a motion for a new trial must relate to errors of law occurring at the trial, and an assignment in a motion for a new trial that “the decision is contrary to law” does not perform the office of an exception to conclusions of law stated upon a special finding of facts. *Jeffersonville School Tp. v. School City, etc.*, 178, 183 (5).
5. *Action for New Trial.—Complaint.—Sufficiency.*—A complaint in an action for a new trial under §589 Burns 1908, §562 R. S. 1881, is insufficient if it fails to show that diligence was used to ascertain the facts relied upon during the term at which the judgment was rendered, or, if such facts were known, that they were not brought to the attention of the court by reason of the excusable neglect of the party seeking the new trial, or by the fraud of the adverse party. *Jones v. Kolman*, 158, 161 (4).

OBJECTIONS—

To the admission of evidence must be specific and state the grounds of objection, see **TRIAL 5**.

OFFICERS—

A final order of the board of county commissioners for the opening of a highway and the payment of damages awarded, made at a time when there was no money in the county treasury available for the purpose will not authorize the auditor to issue a warrant nor the treasurer to pay same if issued, see **HIGHWAYS 2**; *Lortz v. Davis*, 337, 345 (2).

1. *Township Trustee.—Powers.*—Persons doing business with a township trustee are bound to take notice of the extent of his authority, and that his powers are only such as are expressly given by statute, or are necessarily implied therefrom. *Patterson v. Middle School Tp., etc.*, 460, 465 (3).
2. *Township Trustee.—Contracts.—Validity.—Estoppel of Township.*—Where a township trustee does not proceed in the manner provided by the statute under which he seeks to bind his township, the contract is void and no subsequent act can estop the township from setting up its invalidity. *Patterson v. Middle School Tp., etc.*, 460, 465 (4).

OFFICERS—Continued.

3. *Township Trustee.—Contracts.—Validity.—Statutes.*—Contracts made in violation of §9538 Burns 1908, Acts 1899 p. 150, §9, providing that when a township trustee desires to purchase school furniture, fixtures, maps, charts or other supplies, excepting fuel and literary periodicals, authorized by the advisory board, he should make an itemized estimate to be used by bidders, are absolutely void and cannot be enforced.

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4. *Constable.—Levy.—Execution by Deputy.—Liability.*—Where an execution was levied by the deputy of a constable in the name of and by virtue of the authority vested in such constable, the levy was the act of the constable, and a verdict for plaintiff in an action against such constable and the execution plaintiff to replevy the property levied on will not be disturbed because the evidence fails to show that such constable was personally active in making the levy.

McFerran v. Sicaynie, 50, 55 (5).

"ONLY CHILDREN"—

See WORDS AND PHRASES.

PAROL EVIDENCE—

Admissibility of see SALES 4.

PARTIES—

Motion to modify a judgment rendered on a cross-complaint, not made until the term following the term of court at which the judgment was rendered, will not lie in the absence of notice to all the parties, affected by the judgment, see JUDGMENT 2.

A party has a right to have the jury instructed definitely and specifically as to the law applicable to the facts which the evidence tends to prove, if such instructions are properly and seasonably requested and are within the issues, see TRIAL 29; *Henry v. Epstein*, 669, 669 (12).

Real party in interest, see ACTIONS.

PASSENGERS—

Alighting from car, see CARRIERS.

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Part, of debt revives same, see LIMITATION OF ACTIONS 1.

PARTITION—

1. *Right of Action.—Intention of Testator.—Statutes.*—Partition of lands contrary to the intention of a testator is forbidden by §1247 Burns 1908, §1190 R. S. 1881. *Walling v. Scott*, 23, 28 (9).

2. *Right of Action.—Provisions of Will.—Conversion.*—Where land is equitably converted into money by a direction in a will that it should be sold after the death of the life tenant and then distributed, the heir of a beneficiary who died before the termination of the life estate could only share in the proceeds of the sale of such land and could not have partition thereof.

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3. *Rights of Remaindermen.—Statute.—Construction.*—The act of 1909 (Acts 1909 p. 339) providing that any person owning an un-

PARTITION—Continued.

divided interest in fee simple in any lands and at the same time owning a life estate in the remaining portion of such lands or any part thereof, or the person owning the fee in such lands subject to such undivided interest in fee and such life estate in any such lands, may compel partition thereof, expressly abrogates the common law rule which required that the person seeking partition must be entitled to possession in addition to owning an interest in the land and thereby prevented the remainderman from obtaining partition as against the life tenant in possession, so that under said act an owner in fee of an undivided interest in land may have partition thereof although another not in possession holds an undivided interest in the life estate not coupled with an interest in the remainder. *Smith v. Andrew*, 602, 606 (3).

PARTNERSHIP—

1. *Evidence.—Admissions.*—In an action where defendants are alleged to be doing business as a copartnership, and each of the defendants has filed an answer in general denial, an admission of either of the alleged partners is competent as against himself. *Steele v. Michigan Buggy Co.*, 635, 639 (5).
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4. *Settlement.—Construction of Bond.*—The effect of a bond executed by a copartner conditioned for the payment to the other partners of any amount found to be due from him on settlement of the partnership affairs, must be ascertained from the language of the instrument as a whole and from the circumstances and conditions existing at the time of its execution. *Barker v. McClelland*, 296, 302 (2).
5. *Settlement.—Separate Contracts.—Construction.*—Where the plaintiff and his copartners entered into separate agreements, at one and the same time, to arbitrate their partnership affairs, the plaintiff agreeing to pay to his copartners any sum due them upon settlement and they agreeing to pay plaintiff in the event the settlement showed a sum due to him, such agreements constituted one entire transaction and the court will look to all of them to ascertain their full purpose. *Barker v. McClelland*, 296, 302 (4).
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PARTNERSHIP—Continued.

made and agreed on by the parties," cannot be construed to include the payment of a judgment rendered against the plaintiff in a settlement of their differences by the court after the failure of the parties to carry out their agreements to arbitrate.

Barker v. McClelland, 296, 302 (5).

PAYMENT—

1. *Question of Fact.*—Payment and the inference of an admission of continued indebtedness which may be drawn therefrom are questions of fact, and not of law. *Barrett v. Sipp*, 304, 313 (9).
2. *Application.—Intent of Parties.*—Where the debtor pays with one intention and the creditor receives with another, the intent of the debtor will govern as to the application of the payment. *Barrett v. Sipp*, 304, 311 (7).
3. *Application.—Secret Intent of Debtor.*—The secret intent of the debtor as to which of several debts a payment shall be applied, undisclosed at the time of the payment, and not ascertainable from the facts and circumstances surrounding and connected with the payment when made, does not control in the application thereof. *Barrett v. Sipp*, 304, 315 (12).
4. *Payments In Invitum.—Right as to Application.*—The right of a debtor to designate to which of several debts his payment shall be applied does not exist in case of payments *in invitum*, or by process of law, but only where the payment is voluntary. *Barrett v. Sipp*, 304, 311 (6).
5. *Rights as to Application of Payment.*—A debtor, who owes his creditor on separate debts, may direct his payments to be applied to either, and in the absence of such direction the creditor may apply the payment to such of the debts as he may choose. *Barrett v. Sipp*, 304, 311 (5).
6. *Application of Payment by Court.*—Where a debtor makes a payment to one to whom he owes several debts and neither he nor the creditor makes a specific appropriation thereof, the court will apply it according to the equity and justice of the case, having regard first to the intention of the debtor, if it can be gathered from the surrounding circumstances. *Barrett v. Sipp*, 304, 311 (8).

PHYSICIAN—

Failure to call as witness, see WITNESSES 1.

PLEADING.

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|---|-----------------------|
| I. FORM AND ALLEGATIONS, 1-4. | IV. DEMURRERS, 20-25. |
| II. COMPLAINT, 5-13. | V. MOTIONS. |
| III. PLEA OR ANSWER AND CROSS-COMPLAINT, 14-19. | |

I. FORM AND ALLEGATIONS.

1. *Character of Pleading.—Allegations.*—The character of a pleading will be determined from the facts averred therein, and not from the name given to it by the pleader. *Templer v. Muncie Lodge, etc.*, 324, 336 (13).
2. *Prayer.—Determination of Relief Sought.*—A prayer for relief is not decisive, but the relief to which a party is entitled under a pleading must be determined from its material averments. *Templer v. Muncie Lodge, etc.*, 324, 336 (14).

PLEADING—Continued.

3. *Verification.—Execution of Instruments.—Failure to Deny Under Oath.—Effect.*—Failure to deny the execution of an instrument under oath is a waiver of preliminary proof of its execution before being offered in evidence, but does not preclude the introduction of evidence as to the consideration therefor, the situation of the parties and the circumstances of its execution, for the purpose of showing the real intention of the parties.

Jennings v. South Whitley Hoop Co., 241, 250 (6).

4. *Conclusions.—“Duty”.*—Although the use of the word “duty” in a general statement charging that it is one’s duty to do, or to refrain from doing, a certain act or thing, intending thereby to charge that by reason of contractual relations, or by implication of law, one is obligated to do or not to do the particular thing averred, would render such averment the statement of a conclusion, there are cases in which the word may be used in a pleading to designate the character of work to be done, or the act to be performed, in pursuance of an employment, and when so used the allegation is not a conclusion, but one of ultimate fact.

Chicago, etc., R. Co. v. Hamerick, 425, 434 (5).

II. COMPLAINT.

See **CARRIERS** 8-10; **HUSBAND AND WIFE** 7-10; **MASTER AND SERVANT**; **MINES AND MINERALS**; **NEGLIGENCE**; **RAILROADS**; **RECEIVERS**.

For conversion, see **CONVERSION** 1; *Carson v. Hanawalt*, 409, 412 (1).

On contract, allegations of performance, see **CONTRACTS** 26.

Overruling demurrer to bad paragraph of, see **APPEAL** 72.

Judgment on cross-, see **JUDGMENT** 3.

In an action on the bond of a justice of peace, what must allege, see **JUSTICE OF THE PEACE** 1.

Attacking sufficiency of, on appeal how presented, see **APPEAL** 36; *New v. Jackson*, 120, 123 (1).

Amendment to a, will not be permitted when it will operate to defeat the statute of limitations, see **LIMITATION OF ACTIONS** 4.

Where appellant challenges the sufficiency of the complaint for want of facts, but fails to point out any omitted fact essential to a recovery, the complaint will be presumed to contain facts sufficient to bar another action for the same cause, see **APPEAL** 55; *March v. March*, 293, 295 (3).

Sufficiency of, in an action for a new trial, see **NEW TRIAL** 5; *Jones v. Kolman*, 158, 161 (4).

Sufficiency of, in an action against a street car company, see **STREET RAILROADS** 4, 5.

Sufficiency of, in a suit to restrain a grantee of land from interfering with rights acquired under a timber contract, see **INJUNCTION** 4; *Young v. Waggoner*, 202, 205 (2).

The sufficiency of a, to withstand a demurrer for want of facts, must be determined by the appellate court before a judgment appealed from can be set aside because of an insufficient answer, see **APPEAL** 5; *Goldsmith v. First National Bank*, 11, 16 (4).

5. *Sufficiency.*—To be sufficient to withstand a demurrer, a complaint should aver every fact essential to the cause of action.

Chicago, etc., R. Co. v. Chaney, 106, 111 (4).

PLEADING—Continued.

or right of the plaintiff to maintain the action stated in the pleading to which it is addressed.

State, ex rel., v. Liberty Tp., etc., 208, 210 (1).

25. *Ambiguities.—Construction.*—A pleading tested by demurrer, must stand or fall upon its own averments, independent of any apparent strength or weakness given to its theory by other parts of the record, and where doubt, ambiguity or uncertainty arises upon such pleading, the construction to be adopted by the court is that against the pleader.

Chicago, etc., R. Co. v. Chaney, 106, 111 (3).

V. MOTIONS.

For new trial, see **NEW TRIAL** 4.

To modify judgment, see **JUDGMENT** 2.

Ruling on, not in writing, error not available, see **APPEAL** 27.

To insert new matter or to strike out parts of pleadings must be in writing, see **DEPOSITIONS** 1; *Steele v. Michigan Buggy Co.*, 635, 638 (4).

POSSESSION—

Of a written guaranty by the party in whose favor it is made is *prima facie* evidence of its delivery, see **GUARANTY** 1.

PRAYER—

For relief is not decisive, but the relief to which a party is entitled under a pleading must be determined from its material averments, see **PLEADING** 2.

PRESUMPTIONS—

See **APPEAL** 50-57; **DEATH** 1-4; **FRAUD** 1.

As to signing agreement, see **COMPOSITIONS WITH CREDITORS** 4.

The law presumes the grantee in a deed to be a *bona fide* purchaser, see **VENDOR AND PURCHASER** 3.

PRINCIPAL AND SURETY—

1. *Liability of Surety.—Bonds.*—The obligation of the surety on a bond cannot be enlarged beyond the strict terms of the engagement.
Barker v. McClelland, 296, 303 (6).

2. *Bonds.—Construction.*—The rules, that where a bond admits of two constructions, it should, as against a construction which results in injustice and inequity, be fairly and equitably construed, and that its construction should be favorable to the obligee, if consistent with the objects for which the bond was given, have no application to bonds, the terms of which are certain, definite and unambiguous.

Beech Grove Imp. Co. v. Title Guaranty, etc., Co., 377, 381 (1).

3. *Building Contractor's Bond.—Conditions.—Notice of Breach.—Failure to Give.—Effect.*—Where a building contractor's bond provided that no liability should attach to the surety unless in the event of the principal's default, notice thereof should be given the surety by the obligee within thirty days thereafter and before making final payment to the principal, and that the surety should have the right to assume and complete the contract, such provisions were valid and binding, and a failure of the obligee to give such notice relieved the surety from liability.

Beech Grove Imp. Co. v. Title Guaranty, etc., Co., 377, 382 (3)

PROXIMATE CAUSE—

See MASTER AND SERVANT 11; RAILROADS 8, 12; STREET RAILROADS 5.

PUBLIC POLICY—

In determining whether a contract is contrary to public policy the courts will look first to legislative declarations on the subject, if any, and secondly to their judicial interpretation, see CONTRACTS 2.

PUPILS—

Transfer of, see SCHOOLS AND SCHOOL DISTRICTS 4, 5.

Transportation of, see SCHOOLS AND SCHOOL DISTRICTS 3, 6, 7.

QUANTUM MERUIT—

Recovery on, see CONTRACTS 34.

RAILROADS—

See CARRIERS 1-11; MASTER AND SERVANT; RECEIVERS 1, 2.

See TRIAL 32; *Vandalia R. Co. v. Baker*, 184, 187 (1).

1. *Injury to Animals on Tracks.—Complaint.—Theory.—Allegations.*—To be good on the theory that animals injured on defendant's railroad track entered upon the track at a point where the defendant was required to fence, the complaint should allege that the railroad was not fenced at such point.

Chicago, etc., R. Co. v. Chaney, 106, 109 (1).

2. *Injury to Animals.—Negligent Operation of Train.—Complaint.—Causal Connection Between Negligence and Injury.*—In actions to recover for injury to animals caused by the negligent operation of a train, it must appear from the facts directly averred in the complaint, that there was some connection in the way of cause and effect between the acts of negligence complained of and the injury alleged to have resulted therefrom.

Chicago, etc., R. Co., v. Chaney, 106, 111 (5).

3. *Injury to Animals on Tracks.—Negligent Operation of Train.—Complaint.—Failure to Allege Where Animals Entered on Tracks.*—In an action against a railroad company for injury to a team of horses, a complaint alleging that while said animals were on the defendant's track the defendant so negligently ran and operated its cars and locomotive that the same were run against, upon and over said animals, and that the same were injured without fault of the plaintiff, was insufficient in failing to allege that the animals entered upon the track at a highway or street crossing, or at some point where the law imposed on defendant the duty of giving the statutory signals and otherwise operating its train with care.

Chicago, etc., R. Co. v. Chaney, 106, 109 (2), 111 (2).

4. *Injury to Animals.—Obstruction of Crossing.—Complaint.—Sufficiency.*—In an action against a railroad company to recover for injury to animals, where plaintiff alleged that defendant negligently and unlawfully allowed a freight train to remain standing across a street without leaving any space across said street, and that by reason thereof plaintiff's horses entered upon the tracks of said railway, and that while they were upon said tracks the defendant negligently ran its train upon and over them, the averments, to make the complaint good on that theory, must be sufficient to show that the obstruction to the street cross-

PLEADING—Continued.

or right of the plaintiff to maintain the action stated in the pleading to which it is addressed.

State, ex rel., v. Liberty Tp., etc., 208, 210 (1).

25. *Ambiguities.—Construction.*—A pleading tested by demurrer, must stand or fall upon its own averments, independent of any apparent strength or weakness given to its theory by other parts of the record, and where doubt, ambiguity or uncertainty arises upon such pleading, the construction to be adopted by the court is that against the pleader.

Chicago, etc., R. Co. v. Chaney, 106, 111 (3).

V. MOTIONS.

For new trial, see **NEW TRIAL** 4.

To modify judgment, see **JUDGMENT** 2.

Ruling on, not in writing, error not available, see **APPEAL** 27.

To insert new matter or to strike out parts of pleadings must be in writing, see **DEPOSITIONS** 1; *Steele v. Michigan Buggy Co.*, 635, 638 (4).

POSSESSION—

Of a written guaranty by the party in whose favor it is made is *prima facie* evidence of its delivery, see **GUARANTY** 1.

PRAYER—

For relief is not decisive, but the relief to which a party is entitled under a pleading must be determined from its material averments, see **PLEADING** 2.

PRESUMPTIONS—

See **APPEAL** 50-57; **DEATH** 1-4; **FRAUD** 1.

As to signing agreement, see **COMPOSITIONS WITH CREDITORS** 4.

The law presumes the grantee in a deed to be a *bona fide* purchaser, see **VENDOR AND PURCHASER** 3.

PRINCIPAL AND SURETY—

1. *Liability of Surety.—Bonds.*—The obligation of the surety on a bond cannot be enlarged beyond the strict terms of the engagement.

Barker v. McClelland, 296, 303 (6).

2. *Bonds.—Construction.*—The rules, that where a bond admits of two constructions, it should, as against a construction which results in injustice and inequity, be fairly and equitably construed, and that its construction should be favorable to the obligee, if consistent with the objects for which the bond was given, have no application to bonds, the terms of which are certain, definite and unambiguous.

Beech Grove Imp. Co. v. Title Guaranty, etc., Co., 377, 381 (1).

3. *Building Contractor's Bond.—Conditions.—Notice of Breach.—Failure to Give.—Effect.*—Where a building contractor's bond provided that no liability should attach to the surety unless in the event of the principal's default, notice thereof should be given the surety by the obligee within thirty days thereafter and before making final payment to the principal, and that the surety should have the right to assume and complete the contract, such provisions were valid and binding, and a failure of the obligee to give such notice relieved the surety from liability.

Beech Grove Imp. Co. v. Title Guaranty, etc., Co., 377, 382 (3)

PROXIMATE CAUSE—

See MASTER AND SERVANT 11; RAILROADS 8, 12; STREET RAILROADS 5.

PUBLIC POLICY—

In determining whether a contract is contrary to public policy the courts will look first to legislative declarations on the subject, if any, and secondly to their judicial interpretation, see CONTRACTS 2.

PUPILS—

Transfer of, see SCHOOLS AND SCHOOL DISTRICTS 4, 5.

Transportation of, see SCHOOLS AND SCHOOL DISTRICTS 3, 6, 7.

QUANTUM MERUIT—

Recovery on, see CONTRACTS 34.

RAILROADS—

See CARRIERS 1-11; MASTER AND SERVANT; RECEIVERS 1, 2.

See TRIAL 32; *Vandalia R. Co. v. Baker*, 184, 187 (1).

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4. *Injury to Animals.—Obstruction of Crossing.—Complaint.—Sufficiency.*—In an action against a railroad company to recover for injury to animals, where plaintiff alleged that defendant negligently and unlawfully allowed a freight train to remain standing across a street without leaving any space across said street, and that by reason thereof plaintiff's horses entered upon the tracks of said railway, and that while they were upon said tracks the defendant negligently ran its train upon and over them, the averments, to make the complaint good on that theory, must be sufficient to show that the obstruction to the street cross-

RAILROADS—Continued.

ing was the cause of the animals being upon the track when they were injured. *Chicago, etc., R. Co. v. Chaney*, 106, 112 (6).

5. *Crossings.—Duty to Maintain in Good Condition.*—Both at common law and by statute it is the duty of a railroad company to keep the crossings of highways and the approaches thereto in good condition for public travel.

Cleveland, etc., R. Co. v. Federle, 147, 155 (6).

6. *Crossing Accident.—Damage to Property.—Negligence.—Complaint.*—A complaint alleging that defendant's passenger-train, in approaching a street crossing at a speed of twenty miles an hour and in violation of a city ordinance forbidding passenger-trains to be run at a greater speed than twelve miles per hour, collided with plaintiff's car and that if the train had been running at a rate of speed not exceeding twelve miles per hour, the employees in charge thereof could have seen plaintiff's car on the crossing and the signals of plaintiff's employees in time to have stopped said train before striking the car, sufficiently charges actionable negligence.

Cincinnati, etc., St. R. Co. v. Baltimore, etc., R. Co., 283, 285 (3), 287 (3).

7. *Crossing Accident.—Requirement as to Ordinary Care.—Instruction.*—In an action for injuries sustained in being thrown from a wagon while driving over a defective railroad crossing, an instruction which told the jury that the injured person was bound to use reasonable care and caution to avoid injury, and that the degree of care and caution required of him was such as would have been reasonably proportionate to the known difficulty and danger in crossing, was not misleading and was sufficient to inform the jury that he was required to use the care an ordinarily prudent and cautious person would use under like circumstances to avoid injury and that such care is always proportionate to the known danger. *Cleveland, etc., R. Co. v. Federle*, 147, 155 (7).

8. *Crossing Accident.—Negligence.—Proximate Cause.—Evidence.—Sufficiency.*—In an action against a railroad company for injuries to plaintiff's ward, evidence showing that at the time of the injury defendant was engaged in reconstructing its road so that the grade of the south approach to the crossing where the injury occurred had been increased from about four per cent to about forty per cent., and so as to leave an abrupt drop of four or five inches from the level of the crossing to the highway and that the defendant had lessened the width of the highway along the approach from thirty feet to about nine feet and covered it with loose gravel into which vehicles sank as they passed over it, and that plaintiff's ward in driving from the track onto the south approach suddenly pitched downward and fell from his wagon and was injured, was sufficient to warrant the jury in finding the construction of the crossing and approach to have been negligent and that the fall and injury were caused by the slope and by the wheels of the wagon suddenly sinking into the loose gravel thereof.

Cleveland, etc., R. Co. v. Federle, 147, 154 (5), 155 (5).

9. *Crossing Accident.—Negligence.—Contributory Negligence.—Evidence.*—In an action to recover for injuries received in a crossing accident, where the evidence showed that a freight-train was standing on a track near the crossing with its headlight burning and thrown toward the crossing, that its engine was emitting steam and otherwise making noise, that the train

RAILROADS—Continued.

which caused the injury approached the crossing at a rate of forty miles per hour and without sounding a whistle or gong, that the injured party stopped his team about fifty feet from the crossing and looked and listened, and neither seeing nor hearing an approaching train, proceeded slowly toward the crossing and in so doing continued to look and listen, that between the crossing and the point where the injured party stopped there were places where the headlight of an approaching train might have been seen some distance and at other places it could not have been seen because of freight-cars and other obstructions, that the freight-train attracted his attention somewhat and that he did not see the approaching train until too late to avoid the injury, such evidence was sufficient to warrant the jury in finding that the defendant was negligent in the operation of its train at the crossing and that the injured party was free from contributory negligence. *Vandalia R. Co. v. Baker*, 184, 190 (9).

10. *Crossing Accident.—Damage to Property.—Contributory Negligence.—Complaint.*—In an action against a railroad company to recover for the destruction of plaintiff's interurban car in a crossing accident, where the complaint alleged that the collision occurred within five minutes after the trolley-wheel of plaintiff's car became disconnected from the trolley-wire and caused the car to remain standing upon the crossing, that plaintiff's employees used all means within their power to replace the trolley-wheel and move the car off the crossing, but were unable to do so in time to prevent the collision, and that when defendant's train was heard approaching said employees ran toward it "waiving their arms and hallooing," but could not attract the attention of the persons in charge thereof in time to stop it and avoid the collision, the question of whether unnecessary time was consumed in endeavoring to move the car before leaving it to signal the train to stop, as well as the acts of plaintiff's employees in signalling the train to stop, were proper matters to be considered upon a trial in determining whether plaintiff was guilty of contributory negligence, but could not as a matter of law override and control the direct allegation of the complaint that the collision occurred through no fault of the plaintiff, its agent or employees.

Cincinnati, etc., St. R. Co. v. Baltimore, etc., R. Co., 283, 287 (5).

11. *Crossing Accident.—Dangerous Crossing.—Contributory Negligence.*—Even though one may know that there is danger in driving over a railroad crossing, he is justified in proceeding if in so doing he uses such care and caution as a person of ordinary prudence, in like place, would deem sufficient successfully to guard against the threatening danger.

Cleveland, etc., R. Co. v. Federle, 147, 152 (4).

12. *Crossing Accident.—Proximate Cause.—Complaint.—Sufficiency.*—Where it appears from the averments of the complaint, in an action for injuries received in a crossing accident, that plaintiff's ward approached the crossing from the north in a heavily loaded wagon, that he stopped, looked and listened, but neither seeing nor hearing anything, entered upon the track and then saw a rapidly approaching train, that his only means of escape was to go down the south approach to the crossing which defendant had negligently constructed on a forty per cent grade, of loose, unpacked sand and gravel, that it was dangerous and its condition unknown to plaintiff's ward, that in going down said approach

RAILROADS—Continued.

said ward was thrown from his wagon and injured, the complaint sufficiently shows that the fall and injury alleged were the proximate result of the negligent construction of the crossing.

Cleveland, etc., R. Co. v. Federle, 147, 150 (2).

13. *Interurban.—Traffic Agreements.—Validity.—Statute.*—A contract between two interurban railroad companies, whereby the one shall control and transport over its line between certain points all the freight and passenger business of the other for a number of years, is not authorized by §5652 Burns 1908, Acts 1903 p. 330, providing that a street railroad company may sell, lease or otherwise transfer its property, franchises, etc.

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 514 (10).

14. *Interurban.—Contracts.—Traffic Agreement.—Abandonment of Franchise Rights.—Validity.*—A contract between two interurban railroad companies whereby the one shall control and transport over its line between certain points all the freight and passenger business of the other for a period of thirty-five years, amounts to a prohibition against the latter company operating its road in territory occupied by the other, and is therefore invalid as tending to stifle competition and to create a monopoly.

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 509 (4), 510 (4), 514 (4).

15. *Interurban.—Powers.—Traffic Agreements.*—Traction companies may make valid traffic or operating agreements for the use by one of another's tracks, terminals, equipment, etc., where no monopoly is thereby created and neither company incapacitates itself from performing its duties to the public, or foregoes its charter rights to construct and operate a competing road.

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 514 (9).

16. *Interurbans.—Duties.—Abandonment.*—By the acceptance of its franchise, an interurban railroad company is charged with the performance of certain well defined public duties which it cannot at will cast aside and repudiate, so as to defeat the purposes of its organization.

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 510 (5).

17. *Interurban.—Powers.*—The powers and authority of interurban railroad companies are circumscribed by the street railway law of 1861 (Acts 1861 [s. s.] p. 75, §4143 R. S. 1881), as amended and supplemented by later enactments (§4294 Burns 1908, Acts 1903 p. 180; §5630 *et seq.* Burns 1908, Acts 1901 p. 119).

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 508 (1).

18. *Interurban.—Injury to Travelers.—Duty of Traveler.—Looking and Listening.*—The rule in respect to looking and listening which applies to travelers on highways when approaching the crossing of a steam railway, does not apply in all its strictness to one traveling along a highway where the tracks of an interurban railroad are laid longitudinally in the highway.

Henry v. Epstein, 660, 668 (11).

19. *Interurban.—Operation.—Speed.—Travelers on Highway.—Duty.*—Persons in charge of electric cars approaching a point where the existing conditions render the operation of cars dangerous to travelers on the highway are charged with the duty of regulating the speed of the cars as not to expose persons using the highway to unnecessary danger, and to use such care and caution as is required by the known danger to which other travelers on the highway are exposed.

Henry v. Epstein, 660, 667 (9).

RAILROADS—Continued.

20. *Interurban.—Contracts.—Specific Performance.*—In a proceeding for the specific performance of a contract between two interurban railroad companies providing for the transportation of freight and passenger business of the one over the tracks of the other, the court will look to the probable consequences of its enforcement, and the interests, if any, to be affected thereby, before considering individual advantages.

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 509 (3).

21. *Interurban.—Nature of Business.—Rights and Liabilities.*—Since the business of interurban railroad companies is public in its nature and directly involves public interests, they are invested with powers not given to individuals nor strictly private corporations and their rights and liabilities must be construed and measured by the law applicable to *quasi* public corporations.

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 508 (2).

22. *Interurban.—Negligence.—Contributory Negligence.—Evidence.—Sufficiency.*—In an action for personal injuries in being run down by an interurban car, where the evidence showed that the company maintained a double track in the street which passed under a railroad track maintained on a viaduct supported by walls on each side thereof, that owing to the construction of the tracks and road a person using a vehicle could not drive through the viaduct without entering on the tracks, that plaintiff was traveling west and the car which caused the injury was also going west, that on entering the subway plaintiff was on the track used by eastbound cars and on seeing an eastbound car he turned upon the other track and was struck by the westbound car which was traveling at a high rate of speed, that before entering the viaduct plaintiff looked back at a point about six hundred feet east thereof and saw no car approaching from the west, and that a train of cars was crossing over the viaduct which made such noise that might have prevented him from hearing the approach of the car, the evidence warranted the jury in finding the defendant negligent in the operation of its cars at a dangerous rate of speed and that plaintiff was free from contributory negligence.

Henry v. Epstein, 660, 666 (8), 667 (8).

23. *Operation.—Municipal Regulations.*—Railroad companies and their servants owe obedience to municipal ordinances relative to the running of locomotives and trains, intended to protect the lives and property of persons.

Cincinnati, etc., St. R. Co. v. Baltimore, etc., R. Co., 283, 287 (4).

24. *Operation.—Fires.—Evidence.—Sufficiency.*—In an action against a railroad company to recover for the destruction of a building by fire, evidence that defendant's engine threw cinders which fell in showers a distance of more than 250 feet from the railroad, and that fires were started along the railroad right of way immediately after the passage of the engine, fully warranted the jury in finding that the destruction of the building was caused by the negligence of defendant.

Baltimore, etc., R. Co. v. Trustees, etc., 220, 223 (3).

25. *Powers.—Contracts.*—Railroad corporations are incapable of entering into contracts beyond the scope of their powers, expressed or necessarily implied in furtherance of those expressly granted, or of absolving themselves from their obligations to the public, or from performing their corporate duties, without legislative consent.

Evansville, etc., Ry. Co. v. Evansville, etc., Ry., 502, 513 (6).

RATIFICATION—

The husband's, of an unauthorized purchase made by the wife, how may be shown, see **HUSBAND AND WIFE** 3.

REAL ESTATE—

Contracts for sale of real estate, see **CONTRACTS** 11.

RECEIVERS—

May be authorized to sue on account of unpaid stock subscriptions, see **CORPORATIONS** 2; *Haskell v. Gardner*, 1, 3 (2).

1. *Railroads.—Negligence.—Complaint.—Material Allegations.—Control and Management of Operation.*—In an action against the receiver of a railroad for personal injuries, the averment that the operation of the road and the car which caused the injury was at the time under the control and management of the receiver and his servants is a material fact essential to recovery and is put in issue by the general denial.

Henry v. Epstein, 660, 665 (4).

2. *Railroads.—Negligence.—Control and Management of Operation.—Evidence.—Sufficiency.*—In an action against the receiver of a railroad for personal injuries, where the fact that the railroad company was in the hands of a receiver and of the appointment of defendant as such receiver were admitted, and the evidence showed that the car which caused the injury was one of said company's cars running on its tracks, the jury was warranted in inferring that the car was being operated under the control and management of the receiver, his agents and servants.

Henry v. Epstein, 660, 666 (7).

3. *Appointment.—Title or Ownership of Property.*—The appointment of a receiver for a corporation does not affect the title or ownership of the property, but merely takes the custody, control and management thereof out of the hands of the directors and officers of the corporation and places the property in the custody and under the control of the receiver, to be managed by him under the orders of the court.

Henry v. Epstein, 660, 666 (6).

4. *Actions Against.—Complaint.—General Denial.—Proof Required of Plaintiff.—Appointment and Authority of Receiver.*—Under §371 Burns 1908, §365 R. S. 1881, providing that the character and capacity in which a party is sued, and the authority by virtue of which the plaintiff sues, shall require no proof at the trial unless such character, capacity, or authority, be denied by a pleading under oath or by an affidavit filed therewith, plaintiff in an action for personal injuries against the receiver of a railroad, was not required to prove the allegations of the complaint that the railroad was at the time of the injury in the hands of defendant as receiver and that plaintiff had obtained permission to bring the action from the court appointing such receiver, where the only answer filed by defendant was the general denial.

Henry v. Epstein, 660, 664 (3).

"RECOVER"—

See **WORDS AND PHRASES**.

RELIGIOUS SOCIETIES—

Corporate Powers.—Acts of Trustees.—Under the provisions of §4984 Burns 1908, §3824 R. S. 1881, the trustees of a religious society are a body politic and corporate under the name and

RELIGIOUS SOCIETIES—Continued.

style of the society, whose acts as a board are binding on the society, but they cannot bind it by their individual action.

Essex v. Hopkins, 316, 323 (5).

RENT—

Liability for, see **LANDLORD AND TENANT** 13-19.

REPEAL—

By implication of a statute not favored, see **STATUTES** 4; *Milligan v. Arnold*, 559, 562 (5).

REPLEVIN—

1. *Verdict.—Operation and Effect.*—In an action of replevin a general finding in favor of plaintiff is in effect a finding that the plaintiff is the owner of and entitled to the possession of the property in question, but the verdict should find the damages sustained by the detention of the property.

Thurman v. Miller, 372, 374 (3).

2. *Action by Third Person to Recover Property Levied On.—Parties Defendant.*—Where an execution plaintiff assumed control of the writ issued on a judgment had before a justice of the peace and directs the officer as to its execution, he is a proper party defendant with the officer in an action brought by a third person to replevy the property levied on.

McFerran v. Swaynie, 50, 53 (2).

3. *Action for Possession of Money.—Verdict.—Sufficiency.—Value of Property.*—In an action of replevin for the possession of money a verdict that the plaintiff was "entitled to recover from the defendants the \$1,270 described in the complaint," and assessing the damages for the detention, was sufficient, since the word "recover" necessarily meant to "recover possession" and the money being lawful money of the United States, a finding as to its value was unnecessary.

Thurman v. Miller, 372, 376 (4).

REVOCATION—

Of license to enter on real estate, see **LICENSES**.

Of letters of administration, see **EXECUTORS AND ADMINISTRATORS** 8.

RULES—

Violation of, see **MASTER AND SERVANT** 10.

RULES OF COURT—

Have the force and effect of law, see **COURTS** 1; *Webster v. Bligh*, 56, 58 (3).

SALE—

Agreement of, in lease contract may be enforced, see **LANDLORD AND TENANT** 2.

SALES—

See **CUSTOMS AND USAGES** 2, 5.

Fraudulent, see **FRAUD** 2.

Validity of tax, see **TAXATION** 2; *Henderson v. Bivens*, 384, 386 (3).

By employe of saloon-keeper, liability for, see **INTOXICATING LIQUORS** 9.

1. *Action for Price.—Delivery.—Burden of Proof.*—In an action for the price of staves sold, the burden was on plaintiff to show a delivery of the goods described in the contract.

Gandy v. Seymour Slack Stave Co., 72, 76 (2).

SALES—Continued.

2. *Action for Purchase Price.—Defense.—Breach of Warranty.*—Where a breach of warranty is relied on as a complete defense, it must be made to appear that the damages sustained on account of the breach is equal to the amount of plaintiff's claim, or that the article was of no value for any purpose.
LaGrange v. Coyle, 140, 146 (7).
3. *Description.—Contract.—Performance.*—The quality is a part of the description of a thing agreed to be sold and the vendor is bound to furnish articles corresponding with the description.
Gandy v. Seymour Slack Stave Co., 72, 77 (3).
4. *Contract.—Performance.—Subsequent Reduction of Contract to Writing.—Breach of Warranty.—Admissibility of Parol Evidence.*—Where a parol contract of sale or exchange has been fully performed on both sides, a bill of sale thereafter executed containing a recital of the terms of the pre-existing contract as the parties at the time understood and remembered them, although some evidence of the terms of such contract, was not the sole evidence thereof, so that in an action for breach of warranty parol evidence of the terms of the contract was admissible.
Smith v. Hunt, 592, 597 (5).
5. *Contract by Correspondence.—Intention of Parties.—Construction of Letter.*—Where plaintiff offered to sell defendant five hundred tons of melting scrap steel at a certain price per ton delivered, and in its letter in reply thereto defendant stated that it had decided to give "an order for sample car subject to our approval of the five hundred tons mentioned some time ago," and that the order "is given on condition that you can make immediate shipment of the sample car, for if the scrap does not prove satisfactory we will want to have time to investigate sources of supply elsewhere," the fact that the order was expressly limited to a sample car would indicate that there was no intention at that time to order more, and the letter cannot be construed as an agreement to accept and pay for five hundred tons if the sample car proved satisfactory.
Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co., 59, 67 (4), 68 (4).
6. *Exchange of Property.—Fraudulent Representations.—Measure of Damages.—Pleading.—Proof.*—Where property is sold by fraudulent representations, the measure of damages recoverable is the difference between the value of the goods as they actually were and their value had they been as represented, and in such action the value of the consideration exchanged for the property is immaterial and need not be pleaded or proved.
Smith v. Hunt, 592, 601 (9).
7. *Fraud.—Proof.—Instructions.*—Fraud need not be proved by direct or positive evidence, and an instruction, in an action for the price of goods sold, which told the jury that defendant had the burden of proving the defense of fraud by positive and specific affirmative proof, was erroneous.
Gandy v. Seymour Slack Stave Co., 72, 78 (7).
8. *Warranty.—Breach.—Answer.—Sufficiency.*—In an action on a note given for the purchase price of a stallion, an answer setting up a breach of warranty was insufficient for failure to allege what the services of the horse were worth or that he was less valuable than if he had been as warranted.
LaGrange v. Coyle, 140, 145 (5).

SALES—Continued.

9. *Warranty.—Breach.—Remedy.*—It is the general rule that, in the absence of fraud, the breach of warranty of personal property unconditionally sold will not give to the purchaser a right to rescind the contract, but his remedy is by original action on the warranty, or he may set it up by counterclaim, or rely upon it as a defense in an action for the purchase money.

LaGrange v. Coyle, 140, 145 (6).

10. *Breach of Warranty.—Counterclaim.—Fraud.—Instructions.*—In an action for breach of warranty of a horse sold to plaintiff in exchange for a stock of merchandise, where defendant filed a counterclaim based on alleged fraudulent representations of plaintiff relative to such stock of merchandise, an instruction which told the jury that if it found that the merchandise was traded on the basis of an inventory thereof delivered by plaintiff to defendant and on a basis of the prices therein contained and that plaintiff had told defendant's agent the kind and character of invoice and prices contained therein before the trade was consummated, its verdict should be for the plaintiff, was erroneous in that it was misleading and disregarded the alleged fraudulent representations in reference to the quality and fitness of such merchandise.

Smith v. Hunt, 592, 599 (8).

11. *Warranty.—Consideration.—Pleading.—Answer.*—A warranty of the thing sold, made at the time of the sale, is a part of the entire contract, and the price paid for the subject of the sale constitutes the consideration for the warranty, so that in an action on a note for the purchase price of a horse an answer setting up a breach of warranty was not open to the objection that no consideration for the warranty was shown.

LaGrange v. Coyle, 140, 145 (4).

12. *Implied Warranty.—Quality.—Opportunity for Inspection.*—Where goods are offered for delivery under a contract, it is the duty of the vendee to inspect the same before acceptance, if he desires to save his rights in case the goods are of an inferior quality, as there is in such case no warranty of quality which survives acceptance.

Gandy v. Seymour Slack Stave Co., 72, 77 (4).

SCHOOLS AND SCHOOL DISTRICTS—

1. *Contract by School Trustees.—Employment of Superintendent.—Validity.—Public Policy.*—Where the trustees of a school city made a contract employing a superintendent for a term of three years, the bare possibility of abuse of their power neither justifies a denial of authority to make such contract nor shows the same to be against public policy.

Moon v. School City, etc., 251, 257 (4).

2. *Contract by Board of School Trustees.—Employment of Superintendent.—Term of Employment.—Validity.*—Under §6488 Burns 1908, §4445 R. S. 1881, giving the school trustees of an incorporated town or city authority to employ a superintendent for their schools, the term of the employment is left to the sound discretion of the school trustees, and, in the absence of a showing of fraud or an abuse of such discretion, a contract employing a superintendent of city schools for a term of three years was valid, although it extended beyond the term of any member of the board as composed at the time the contract was made.

Moon v. School City, etc., 251, 252 (1), 256 (1).

SCHOOLS AND SCHOOL DISTRICTS—Continued.

3. *Discontinuance of Schools.—Transportation of Pupils Transferred.—Statutes.—Construction.*—Section 6423 Burns 1908, Acts 1907 p. 444, making it the duty of the township trustee to provide for the education of pupils affected by the discontinuance of a school, and to provide means of transportation for such pupils who live certain distances from the school to which they are transferred, is remedial and administrative in its character, and should be liberally construed.

Patterson v. Middle School Tp., etc., 460, 464 (1).

4. *Transfer of Pupils.—Action for Tuition.—Recovery of Penalty.*—Under the provisions of the act of March 6, 1909 (Acts 1909 p. 331), in an action by one school corporation against another to recover tuition due on account of the transfer of pupils, where the evidence warrants a finding that tuition was due in the sum claimed and that there was a failure to pay same as provided in said act, the court must add a penalty of ten per cent to the amount found due.

Jeffersonville School Tp. v. School City, etc., 178, 181 (2).

5. *Transfer of Pupils.—Action for Tuition.—Motion for New Trial.—Excessive Recovery.—Appeal.*—In an action brought under the act of March 6, 1909 (Acts 1909 p. 331), to recover tuition due on account of the transfer of pupils, alleged error in overruling a motion for a new trial because the recovery is too large is unavailing on appeal against a judgment for plaintiff for the amount of the tuition and the statutory penalty of ten per cent, where there was evidence to warrant the court in finding that the tuition claimed was due and had not been paid as required by said act.

Jeffersonville School Tp. v. School City, etc., 178, 182 (3).

6. *Transportation of Pupils.—Contract.—Notice.*—Section 9598 Burns 1908, Acts 1899 p. 150, §9, relates only to building or repairing school houses, and furnishing school supplies, other than fuel and literary periodicals, and does not require notice to be given by the township trustee before letting a contract for the transportation of children.

Patterson v. Middle School Tp., etc., 460, 466 (5).

7. *Transportation of Pupils.—Duty of Trustee.—Contract.—Validity.*—Under §6423 Burns 1908, Acts 1907 p. 444, a township trustee is compelled to provide means of transportation for children affected by the discontinuance of the school in the district where they reside if they reside certain distances from the school which they are required to attend after such discontinuance, and where there was an unexpended appropriation for the purpose, a contract made by the township trustee for the transportation of pupils entitled to such transportation under the statute, though made without notice, was, in the absence of a statute requiring notice to be given of the letting of the contract, enforceable against the township, and was not affected by the fact that the pupils so transported became of school age long after the school of the district in which they resided had been discontinued.

Patterson v. Middle School Tp., etc., 460, 466 (6).

"SIGNAL"—

See WORDS AND PHRASES.

SPECIAL FINDINGS—

See TRIAL.

SPECIFIC PERFORMANCE—

1. *Contract for the Sale of Land.—Necessity for Demand.*—Where a vendor repudiates his contract to convey real estate, and denies the right of the other party to receive the title, a demand for a conveyance is not necessary before suit for specific performance.
Jordan v. Johnson, 213, 219 (6).
2. *Contract for Sale of Land.—Contract in Form of Bond.—Sufficiency.*—An instrument which shows the parties and the terms of an executory contract for the sale of land, and so identifies the property as to afford the means of a description in the conveyance, is sufficient and equity will decree its specific performance, although it is technically in the form of a bond.
Jordan v. Johnson, 213, 218 (2).
3. *Contracts for the Sale of Land.—Remedy Against Purchaser With Notice of Contract.*—Where a vendor, in violation of his agreement to convey land to one person, conveys it to another with notice of the contract, the first vendee may compel the latter specifically to perform the grantor's contract.
Jordan v. Johnson, 213, 218 (3).
4. *Contract for the Sale of Land.—Tender of Purchase Price.*—Where a vendor has violated his executory contract for the sale of land, the vendee may have specific performance without an unconditional tender of the balance of the purchase money, where he shows his readiness and willingness to perform his part of the contract on compliance therewith by the grantor.
Jordan v. Johnson, 213, 219 (5).
5. *Contract for Sale of Land.—Bond.—Rights of Purchaser.*—Where an instrument is in the form of a bond for the payment of money, conditioned to be void on the conveyance of real estate, the penalty will be regarded as a mere security for the conveyance of the land, so that the purchaser may elect to sue for specific performance instead of relying on the remedy for damages, unless a contrary intent is clearly shown by the terms of the instrument.
Jordan v. Johnson, 213, 217 (1).
6. *Contract for Sale of Corporate Stock.—Complaint.—Averments as to Performance.*—A complaint seeking to compel specific performance of a contract wherein plaintiff agreed to sell defendant certain corporate stock and release a claim that he held against the corporation, was insufficient for failure to allege that a tender of the stock was made to defendant before the action was brought, and is not cured by a general allegation of plaintiff's performance and willingness to perform.
Atkins v. Kattman, 233, 238 (5).

SPEED—

Observing, see EVIDENCE 5, 6; *Rump v. Woods*, 347, 357, 358 (13) (12).

STATUTE OF FRAUDS—

See FRAUDS, STATUTE OF.

STATUTES—

See DEEDS 6.

Mechanics' lien, strictly construed, see MECHANICS' LIENS 2; *Toner v. Whybrew*, 387, 392 (4).

Repeal by implication, see DRAINS 2; *Milligan v. Arnold*, 559, 560, 563 (1).

STATUTES—Continued.

Mandatory, requiring letters to be granted to the next of kin, where application is made in time, see **EXECUTORS AND ADMINISTRATORS** 3; *Curry v. Plessinger*, 166, 175 (6).

1. *Opening and Vacating Judgments.—Construction.*—A statute providing for the opening or vacation of judgments is remedial in its nature and should be liberally construed.

First Nat. Bank v. Stillwell, 226, 232 (5).

2. *Construction.—Meaning of Words.—“Void” and “Invalid.”*—The words “void” and “invalid,” when used in regard to contracts not immoral nor against public policy, usually mean voidable at the option of one of the parties or some one legally interested therein.

Doney v. Laughlin, 38, 42 (3).

3. *Construction.—General Rules.*—Statutes *in pari materia*, and those on the same general subject not strictly *in pari materia*, should be construed together when necessary to ascertain and carry into effect the legislative intent, and §7463 Burns 1908, Acts 1901 p. 104, requiring commission contracts for the sale of real estate to be reduced to writing, should be construed in connection with various sections of the statute of frauds.

Doney v. Laughlin, 38, 40 (1).

4. *Repeal by Implication.*—The law does not favor the repeal of a statute by implication.

Milligan v. Arnold, 559, 562 (5).

5. *Repeal by Implication.*—When a new statute is intended to furnish the exclusive rule on a certain subject, or when it covers the whole subject-matter of an old statute and adds new provisions and makes changes, and is evidently intended to be a revision, it repeals the old law by implication.

Milligan v. Arnold, 559, 562 (6).

6. *Titles.—Legislative Intent.*—The title of an act may be considered in determining the legislative intent.

Milligan v. Arnold, 559, 562 (4).

7. *Construction.—Legislative Intent.*—While statutes in derogation of the common law are to be strictly construed, the primary rule of construction is to ascertain and give effect to the intent of the statute.

Smith v. Andrew, 602, 605 (1).

8. *Construction.—Legislative Intent.*—In the construction of a statute, the intent, as gathered from an examination of the whole and all its parts, prevails over the literal import of particular terms when the strict letter of such terms would lead to injustice and contradiction.

Smith v. Andrew, 602, 605 (2).

9. *Construction.—Intention of Legislature.*—In determining the intention of the legislature in enacting a statute, we may look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, the mischief intended to be remedied and to all like and kindred matters.

Doney v. Laughlin, 38, 41 (2).

10. *Validity.—Title of Act Broader than Subject.*—A legislative enactment is not invalid on the ground that its title is broader than the subject of the legislation, since the body of the act is the legislative expression.

Milligan v. Arnold, 559, 562 (3).

STOCK—

Contract to sell corporate, see **SPECIFIC PERFORMANCE** 6.

Security for loan of, see **MORTGAGES** 2-5.

STREET RAILROADS—

See CARRIERS 12, 13.

1. *Maintenance.—Duty.*—A street railroad company owes a duty to travelers on a highway to maintain posts which will not fall because of their rotten and decayed condition when there is a slight impact against them from an outside force.
Evansville, etc., Traction Co. v. Montgomery, 528, 534 (8).
2. *Maintenance. — Injury to Animals. — Evidence. — Sufficiency.*—Evidence that plaintiffs' horses became frightened at a street car and one of them came in contact with a post maintained by defendant for the support of its trolley wire, that the impact was slight, that the post was rotten and because of its rotten condition fell and killed the horse, and that defendant knew of the rotten condition of posts in that immediate locality, was clearly sufficient to support a verdict for plaintiffs in an action to recover the value of such horse.
Evansville, etc., Traction Co. v. Montgomery, 528, 533 (7).
3. *Maintenance.—Injury to Animals.—Evidence.*—In an action for the value of a horse killed by the falling of a decayed post which the defendant had maintained for the support of its trolley wire, evidence that other posts of the defendant of the same kind, the same size put into position at the same time in the same character of soil and equally exposed to the elements near to the one which fell and killed the horse had previously fallen and that defendant had removed others more than half rotten, was properly admitted as showing defendant's knowledge of the dangerous character of posts in that immediate locality.
Evansville, etc., Traction Co. v. Montgomery, 528, 533 (6).
4. *Operation.—Negligence.—Complaint.—Sufficiency.*—In an action against a street car company, a paragraph of complaint which charged negligence on the part of defendant in so operating its car as to frighten plaintiffs' horse, causing it to run against a rotten and decayed post, which fell and killed the horse, was a sufficient statement of actionable negligence.
Evansville, etc., Traction Co. v. Montgomery, 528, 533 (5).
5. *Negligence.—Proximate Cause.—Complaint.—Sufficiency.*—A paragraph of complaint in an action against a street car company to recover for the value of a horse killed by the falling of one of defendant's posts, which alleged that defendant, knowing the rotten and decayed condition of the post, and that it was dangerous to travelers, carelessly and negligently permitted the same to stand in the highway in such rotten and decayed condition, and that plaintiffs' horse was killed solely by reason of said negligence of defendant, sufficiently showed the negligence of defendant to be the proximate cause of the injury without alleging that the post fell by reason of such rotten and decayed condition.
Evansville, etc., Traction Co. v. Montgomery, 528, 530 (1).

STREETS—

Use of, see NEGLIGENCE 13-15.

SUBSCRIPTIONS—

1. *Consideration.*—The consideration for a subscription contract may consist of a benefit to the promisor or of a detriment to the promisee.
Brown v. Marion Commercial Club, 670, 676 (4).
2. *Misapplication of Funds.—Defense.*—Where a subscription becomes due, payment cannot be refused on the grounds that the

SUBSCRIPTIONS—Continued.

funds will be misapplied, since if the money is not properly applied the subscriber has his remedy.

Brown v. Marion Commercial Club, 670, 682 (10).

3. *Nature.—Joint or Several Liability.*—A subscription is several, where a default by one subscriber will not affect the liability of any other. *Brown v. Marion Commercial Club*, 670, 674 (1).

4. *Limiting Time and Amount of Payment.—Defense.*—Where a subscription to a factory bonus fund provided that no more than fifty per cent of the subscription would become due in any one year, defendant, having failed for two years to pay any part of his subscription, cannot avoid the payment of any part of his subscription because of plaintiff's failure to enforce the payments as they became due.

Brown v. Marion Commercial Club, 670, 683 (11).

5. *Actions. — Answer. — Evidence. — Admissibility.* — In an action against a subscriber to a factory bonus fund, where plaintiff is required to allege and prove its agreement to pay a bonus for the location of a factory, by reason of which defendant's subscription is due, evidence showing that items of indebtedness did not accrue to plaintiff because of any agreement to pay a bonus for the location of a factory, is admissible under the general denial.

Brown v. Marion Commercial Club, 670, 679 (6), 683 (6).

6. *Factory Bonus.—Liability of Subscriber for Expense Incurred.*—A subscription to a bonus fund for the location of factories does not render the subscriber liable for the payment of expense incurred in procuring factories to be located.

Brown v. Marion Commercial Club, 670, 683 (12).

7. *Factory Bonus.—Consideration.—Revocation.*—A subscription to a fund, to provide bonuses for the location of additional factories in a city, is not revocable before bonuses are paid or agreed to be paid, on the theory that liability to pay does not attach until some liability has been assumed, or some expense incurred by the promisee, since the real consideration, where the object to be accomplished is of interest to all and is not likely to be attained except by combined performance, is the promise which others have made or will make by subscribing to the same object.

Brown v. Marion Commercial Club, 670, 677 (5).

8. *Factory Bonus.—Action.—Defense.*—In an action by a commercial club on a subscription to a factory bonus fund, the fact that bonus agreements were made with certain officers, directors and stockholders of the club or with corporations in which they were directly interested, is no defense, in the absence of fraud in such agreements which entered into or in any manner influenced the subscription.

Brown v. Marion Commercial Club, 670, 681 (9), 682 (9).

9. *Factory Bonus.—Action.—Defense.*—It is no defense to an action on a subscription to a factory bonus fund, that factory owners, with whom agreements to pay bonuses had been entered into, had forfeited their contracts and moved their factories elsewhere, where the subscription matured by plaintiff's agreement to pay bonuses, and the form of the agreement was left to the parties making it, and the subscription provided that bonuses returned under forfeited agreements should be used in the location of other factories.

Brown v. Marion Commercial Club, 670, 680 (8).

SUPPORT—

Injury to means of, see INTOXICATING LIQUORS 10.

TAXATION—

1. *Tax Deed.—Evidence.*—A tax deed is *prima facie* evidence of the regularity of the sale, of all prior proceedings, and of the title thereby conveyed. *Henderson v. Bivens*, 384, 386 (2).
2. *Tax Sales.—Validity.—Burden of Proof.*—The party attacking the validity of a tax sale has the burden to show by competent proof the invalidity of the sale to give title. *Henderson v. Bivens*, 384, 386 (3).

TENDER—

Of purchase price, see SPECIFIC PERFORMANCE 4.

TENANCY IN COMMON—

1. *Conveyance by One Tenant in Common.—Covenants.*—Where a tenant in common conveys his interest, any covenant in the deed is limited to the interest granted. *Ragle v. Dedman*, 359, 362 (4).
2. *Rights of Tenants.*—Tenants in common have all the rights of a tenant in severalty, except that of sole possession. *Ragle v. Dedman*, 359, 362 (3).
3. *Nature of Possession.*—There was unity of possession between tenants in common who acquired their land by descent, although the quantities of their estate or interest may have been unequal. *Ragle v. Dedman*, 359, 361 (1).

TESTAMENT—

Partition of land contrary to the intention of a testator, is forbidden, see PARTITION 1; *Walling v. Scott*, 23, 28 (9).

"TILL"—

See WORDS AND PHRASES.

TIMBER—

Contract, interfering with rights under, see INJUNCTION 3; *Young v. Waggoner*, 202, 205 (1).

TIME—

Extension of, for filing briefs to March 3, the filing of after March 2 was not in time and authorized a dismissal of the appeal, see APPEAL 38.

1. *Computation.—"To."—"Till."—"Until."*—When the word "to" is used as a conjunction, it is synonymous with "till" or "until," and where the time for doing a thing is "to" a certain day such day is not included. *Myers v. Winona, etc., R. Co.*, 258, 259 (2).
2. *Computation.—Exclusion of Sunday.—Time for Filing Briefs.*—The provisions of §1350 Burns 1903, §1280 R. S. 1881, for computing the time within which an act is to be done and providing that if the last day be Sunday, it shall be excluded, apply to the time for filing briefs. *Myers v. Winona, etc., R. Co.*, 258, 259 (1).

TITLE—

Of act broader than subject, see **STATUTES** 10.

Of an act may be considered in determining the legislative intent, see **STATUTES** 6.

The subject-matter of a legislative enactment must be expressed in its, a failure in this respect will invalidate the part not so expressed, see **CONSTITUTIONAL LAW**; *Milligan v. Arnold*, 559, 562 (2).

“TO”—

See **WORDS AND PHRASES**.

TOWNSHIP TRUSTEE—

See **OFFICERS** 1-3.

TRAFFIC ARRANGEMENTS—

See **RAILROADS** 13-15.

TRANSPORTATION—

Of pupils, see **SCHOOLS AND SCHOOL DISTRICTS** 3, 6, 7.

TRIAL.

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| I. COURSE AND CONDUCT OF TRIAL,
1, 2.
II. RECEPTION OF EVIDENCE, 3-8. | III. INSTRUCTIONS, 9-35.
IV. VERDICT, INTERROGATORIES AND SPECIAL FINDINGS, 36-46. |
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I. COURSE AND CONDUCT OF TRIAL.

To save a question on the overruling of a motion for a directed verdict, see **APPEAL** 6.

To make objections to the misconduct of the jury available, see **APPEAL** 8; *New v. Jackson*, 120, 131 (10).

1. *Duty of Court and Jury.*—It is the duty of the judge to instruct the jury as to matters of law, and of the jury to decide the facts of the case. *Vandalia R. Co. v. Baker*, 184, 188 (5).

2. *Misconduct of Jury.—Knowledge.—Waiver.*—Where appellant knew of the misconduct of the jury in time to present a motion to withdraw the submission of the cause to the jury, but failed to do so, he cannot thereafter, on account of such misconduct, avoid the effect of a verdict against him.

New v. Jackson, 120, 131 (11).

II. RECEPTION OF EVIDENCE.

3. *Reception of Evidence.—Purpose.*—Where evidence is competent for any purpose no error can be predicated on its admission.

Indiana Union Traction Co. v. Pring, 566, 579 (7).

4. *Reception of Evidence.—Objections.—Motion to Strike Out.*—Where a witness was permitted to testify at some length, an objection to his testimony, made for the first time at the close thereof, and also a motion to strike out the same, which followed a ruling on the objection, and was based on the same grounds offered in support of the objection, were each correctly overruled.

Regina Co. v. Galloway, 92, 93 (1).

TRIAL—Continued.

5. *Objection to Evidence.—Sufficiency.*—An objection to the admission of evidence must be specific and state the grounds of objection. *Taylor v. Campbell*, 515, 520 (2).
6. *Issues.—Evidence.*—Where a material fact averred in a complaint is not traversed by defendant, such fact is not in issue and need not be proved. *Henry v. Epstein*, 660, 664 (2).
7. *Evidence.—Inferences from Facts Proved.—Consideration by Jury.*—The jury has a right to consider all the evidence, and determine its weight as applied to any issuable fact in the case, and also to consider what may be reasonably inferred from what is thus proved. *Chicago, etc., R. Co. v. Hamerick*, 425, 447 (18).
8. *Conclusions of Law.—Exceptions.—Admission of Facts.—Limitation of Rule.*—The rule that, for the purposes of the exception, an exception to a conclusion of law admits that the facts have been fully and correctly found, is limited to the facts found within the issues formed by the pleadings. *Wills v. Mooney-Mueller Drug Co.*, 193, 199 (4).

III. INSTRUCTIONS.

- See APPEAL 80-90, 97, 105, 114; CARRIERS 11-13; MASTER AND SERVANT; RAILROADS; SALES 7, 10.
- Effect of exceptions to, in gross, see APPEAL 17.
- Refusal to give, when erroneous, see CARRIERS 5.
- How brought into record, see APPEAL 19; *Cronin v. Keesling*, 260, 262 (3).
- In action for unlawful sale of liquors, see INTOXICATING LIQUORS 1-5.
- In an action for breach of a parol lease, see FRAUDS, STATUTE OF 3; *Boggs v. Toney*, 289, 291 (5).
- Objection to an, that it was "fatally erroneous" is not available, because too indefinite and uncertain, see APPEAL 41.
- To make a joint objection to, available, it must appear that all the instructions named are incorrect, see APPEAL 12.
- In an action for damages for fraud perpetrated in an exchange of property, see FRAUDULENT REPRESENTATIONS; *New v. Jackson*, 120, 127 (6).
- Error in the giving of an, is waived where appellant fails to set out the instructions in his brief, or to point out the alleged error, see APPEAL 35, 37.
- The giving of an, announcing two standards of duty for the measurement of defendant's conduct in determining whether he was negligent, is not prejudicial error, see APPEAL 3; *Rump v. Woods*, 347, 355 (8).
- Where appellant fails to save an exception to an instruction at the time it is given, the giving of such instruction is not a cause for a new trial and no question can be presented thereon for review, on appeal, see APPEAL 10; *Cronin v. Keesling*, 260, 262 (2).
9. *Instructions.—Consideration.*—The instructions given in a case are to be considered as a whole. *Steele v. Spaunhurst*, 564, 565 (2).
 10. *Instructions.—Application to Case.*—The instructions to a jury should state the law correctly in view of the issues and the evidence. *Lake Erie, etc., R. Co. v. Beals*, 450, 456 (10).

TRIAL—Continued.

11. *Instructions.—Invading Province of Jury.*—A court may not substitute its judgment on a question of fact for the judgment of the jury.
Rump v. Woods, 347, 356 (10).
12. *Instructions.—Refusal.*—Where instructions tendered were completely covered by others given by the court, their refusal was not error.
Baltimore, etc., R. Co. v. Trustees, etc., 220, 222 (2).
13. *Instructions.—Refusal.—Instructions Covering Those Refused.*—It is not error to refuse requested instructions where they are covered by the instructions given.
Chicago, etc., R. Co. v. Hamerick, 425, 448 (21).
14. *Instructions.—Refusal.—Covered by Other Instructions.*—The refusal of a requested instruction is not erroneous where its subject matter is covered by other instructions given.
Vandalia R. Co. v. Baker, 184, 187 (3).
15. *Instructions. — Peremptory. — Evidence. —* When there is some evidence in support of every material allegation of the complaint, it is error to direct a verdict for defendant.
Bennett v. Chicago, etc., R. Co., 264, 265 (1).
16. *Instructions.—Positive and Negative Evidence.—Weight.*—The jury may not be told that positive evidence is to be given more weight than negative evidence.
Vandalia R. Co. v. Baker, 184, 189 (6).
17. *Instructions.—Inconsistent or Misleading.*—Where two or more instructions are inconsistent and calculated to mislead the jury, or leave it in doubt as to the law, they are cause for reversal.
Steele v. Michigan Buggy Co., 635, 643 (13).
18. *Instructions. — Refusal. — Covered by Other Instructions. —* It was not error to refuse instructions tendered by appellant that were in substance covered by instructions given by the court.
Cleveland, etc., R. Co. v. Federle, 147, 157 (10).
19. *Instructions.—Construed as a Whole.*—A cause will not be reversed because a particular instruction may be erroneous where the instructions, when taken as a whole, correctly state the law applicable to the entire case.
Baltimore, etc., R. Co. v. Trustees, etc., 220, 222 (1).
20. *Instructions.—Sufficiency.*—Instructions directing the jury to find for the plaintiff if certain facts enumerated therein are proved, but which fail to enumerate certain other facts proof of which was necessary to a recovery by plaintiff, are erroneous.
Goldsmith v. First National Bank, 11, 19 (8).
21. *Instructions.—Incomplete Instruction.—Failure to Tender Complete Instruction.—Waiver of Error.*—Error in giving an incomplete instruction, which states the law correctly as far as it goes, is waived by failure to tender a more complete instruction on the subject.
Chicago, etc., R. Co. v. Hamerick, 425, 448 (23).
22. *Issues.—Instructions.*—In an action for damages for injuries sustained while alighting from a street car, an instruction giving undue prominence to issues about which there was no dispute and directing the attention of the jury specially to them, without mention of the one most material to the case must be held to have misled the jury in the absence of an instruction on said omitted issue.
Caughell v. Indianapolis Traction, etc., Co., 5, 10 (4).
23. *Instructions.—Withdrawal.—Sufficiency.*—An instruction that "the instructions heretofore given you in this cause are now withdrawn and the court gives to you the following instructions on

TRIAL—Continued.

which you are to decide this case," was a sufficient withdrawal of the instructions and no error can be predicated on any instruction so withdrawn.

Goldsmith v. First National Bank, 11, 18 (7).

24. *Instructions.—Partnership.*—In an action against one charged as a partner, an instruction that "a partnership is a combination by two or more persons of capital, or labor, or skill, or some or all of these, for the purpose of business for their common benefit," was erroneous in that it omitted the element of co-ownership of the profits of the business, which is the ultimate and conclusive test of a partnership.

Steele v. Michigan Buggy Co., 635, 644 (14).

25. *Liability of One Holding Himself Out as Partner.—Instruction.—Error Not Cured by Correct Instruction.*—Where defendant was sought to be charged as a partner on the ground that he had held himself out as such, an erroneous instruction which undertook to tell the jury what created a liability against him and omitted therefrom a necessary element constituting such liability, was not cured by another instruction correctly stating the law.

Steele v. Michigan Buggy Co., 635, 643 (12).

26. *Instructions. — Peremptory. — Consideration of Evidence.* — In passing on a motion to direct a verdict, the court cannot weigh the evidence, but must consider only the evidence favorable to the party against whom the instruction is asked, and treat all facts as true which such evidence tends to establish, and indulge in his favor every inference which the jury might reasonably draw.

Bennett v. Chicago, etc., R. Co., 264, 266 (2).

27. *Reception of Evidence.—Evidence Competent for Certain Purpose.—Limiting Effect.—Instruction.—Failure to Request.*—Where evidence is admissible for a certain purpose, and there is a probability that the jury may consider it on the main proposition in the case, the party likely to be prejudiced thereby may tender an instruction in which the application of such evidence is properly restricted and limited, and failing so to do, such party cannot be heard to complain of its prejudicial effect.

Indiana Union Traction Co. v. Pring, 566, 580 (9).

28. *Instructions.—"Preponderance of the Evidence".*—An instruction that a "preponderance of the evidence" meant that which was most satisfactory to the minds of the jurors, and which stated that the question should not be determined from the number of witnesses that testified for or against any of the points in controversy, but solely from what the jury thought the evidence showed to be the truth in the matter, although a departure from the general definition, was not misleading or harmful.

Thurman v. Miller, 372, 376 (5).

29. *Instructions.—Request.—Rights of Parties.*—A party has a right to have the jury instructed definitely and specifically as to the law applicable to the facts which the evidence tends to prove. If such instructions are properly and seasonably requested and are within the issues; and, where evidence is offered by a party tending to prove a state of facts within the issues, he is entitled to an instruction submitting such hypothetical state of facts to the jury advising it as to the law applicable thereto, provided they find such facts to be established by the evidence.

Henry v. Epstein, 660, 669 (12).

TRIAL—Continued.

29. *Instructions.—Objection Cured by Other Instructions.—Where.* In an action to recover damages for malpractice, the court in one of its instructions called the attention of the jury to the inquiry, whether, under the evidence, defendants were negligent in failing to anticipate and provide against the occurrence which caused the injury, the impropriety, if any, in the giving of such instruction was cured by the further instruction that the court did not intend to indicate any opinion as to the facts in the case or that he had any opinion as to what facts were proved or disproved by the evidence. *Steele v. Spaulhurst*, 564, 565 (1).
31. *Instruction.—Comparing Evidence.—Refusal.—*An instruction. In an action to recover for injuries received at a railroad crossing, which told the jury that it was its duty to reconcile any conflict or apparent conflict in the testimony, and that in doing so it could consider that a person may hear the sound of a whistle or a bell, and not be conscious of hearing such sound, was properly refused as invading the province of the jury. *Vandalia R. Co. v. Baker*, 184, 188 (4).
32. *Instructions.—Railroads.—Street Crossings.—Care Required.—*In an action against a railroad company for personal injuries received at a street crossing, an instruction that it was the duty of defendant to give timely warning of the approach of the train to the crossing, whether or not there was a statute or ordinance requiring it to do so, and that any failure to exercise such care, if shown to exist, was negligence on the part of defendant, was not erroneous where there was another instruction which informed the jury as to the statutory duty of the defendant to give warnings at crossings. *Vandalia R. Co. v. Baker*, 184, 187 (1).
33. *Instructions.—Province of Jury.—Contributing Negligence.—*An instruction that a person on foot, while lawfully using a public street, is not required to be looking or listening continuously to ascertain whether automobiles are approaching under the penalty, on failure to do so, of being presumed negligent if he is injured, is erroneous, since the question of whether a failure to look or listen continuously will constitute negligence must depend upon the circumstances of the occasion and is for the jury to determine. *Rump v. Woods*, 347, 355 (9).
34. *Instructions.—Applicability to Evidence.—*In an action for injuries resulting from a collision with an interurban car, the instructions defining the care required of plaintiff and the precautions which he was required to use before driving on the tracks of the defendant, though worded so as to be applicable to any person under like conditions and circumstances, were not objectionable, where the facts and circumstances referred to in the instructions were so applicable to the state of facts claimed to have been shown by the evidence that the jury could not have failed to make the proper application of the law to the facts which the evidence tended to prove. *Henry v. Epstein*, 660, 670 (13).
35. *Instructions.—Fraudulent Representations.—Elements Omitted.—Omissions Covered by Other Instructions.—*In an action for damages for fraud perpetrated in an exchange of property, no error was committed in giving an instruction not purporting to include all the principles of law that enter into fraudulent representations, but which was in accord with such principles in so far as it made the attempt to include them, nor in giving instruc-

TRIAL—Continued.

tions which simply undertook to define the character of the misrepresentation that constitutes fraud, without attempting to include all the elements necessary to a recovery, but in each of which the principles declared were correct, where other instructions were given which correctly covered all omissions complained of and on which appellant was entitled to have an instruction.

New v. Jackson, 120, 123 (3).

IV. VERDICT, INTERROGATORIES AND SPECIAL FINDINGS.

See MASTER AND SERVANT 26; NEGLIGENCE; REPLEVIN 1, 3.

Reconciling verdict with answers to interrogatories, see APPEAL 57.

Where there is no irreconcilable conflict between the answers to interrogatories and the general verdict, the verdict will stand, see APPEAL 63.

36. *Verdict.—Sufficiency of the Evidence.*—If a complaint counts on the breach of a parol warranty, a verdict for plaintiff is not sustained by evidence showing the contract to have been in writing.
Smith v. Hunt, 592, 594 (2).

37. *Verdict.—Requisites and Sufficiency.—Venire De Novo.*—A verdict, although informal, will be held sufficient and a *venire de novo* will not be granted, if on reasonable intendment it covers the issues and can be understood by the court.

Thurman v. Miller, 372, 374 (2), 375 (2).

38. *Verdict.—Answers to Interrogatories.—Conflicting Answers.—Effect.*—Where answers by the jury to certain interrogatories are in conflict with its answers to other interrogatories, their effect is thereby nullified and rendered unavailing to overthrow the general verdict.
Cleveland, etc., R. Co. v. Federle, 147, 152 (3).

39. *Answers to Interrogatories.—Conflict.*—Where answers to interrogatories favorable to the unsuccessful party are in conflict with other answers adverse to his contention, they will not support a motion for judgment thereon.

American Surety Co. v. State, ex rel., 475, 484 (6).

40. *Venire De Novo.—Failure to Find on All the Issues.*—A failure to find on all the issues is not cause for a *venire de novo*.

Thurman v. Miller, 372, 374 (1).

41. *Findings.—Venire De Novo.*—A *venire de novo* should not be granted unless the finding is so defective or uncertain on its face that it is incapable of supporting any conclusion of law, or of forming the basis of any judgment on the issue involved.

Geiger v. Town of Churubusco, 685, 690 (2).

42. *Defective Findings.—Venire De Novo.*—A defective attempt in the special findings to cover a material issue by stating items of evidence only instead of the fact which ought to have been found, is ground for a motion for a *venire de novo*.

Barrett v. Sipp, 304, 314 (10), 315 (10).

43. *Findings.—Sufficiency.—Venire De Novo.*—In an action to enjoin the emptying of sanitary sewage into an open ditch, where the court found that the use of the sewer did not cause overflows on the lands of the plaintiffs, that the flow of waters in the ditch was sufficient to dilute the filth and dirt so as to prevent it from producing an unhealthful condition along its course, and that the evidence failed to show that the property of the plaintiffs was

TRIAL—Continued.

damaged or reduced in value, was sufficiently definite to support a judgment, and a motion for *venire de novo* was properly overruled. *Gelger v. Town of Churubusco*, 685, 687 (1), 690 (1).

44. *Findings by Jury.*—A jury is justified in finding a fact to be true where such fact is admitted, where the court takes judicial notice thereof, where the evidence directly proves it, or where it may be rightly and reasonably inferred from other facts which are either admitted, proved by the evidence, or taken notice of judicially. *Henry v. Epstein*, 660, 665 (5).

45. *Findings.—Incompetent Evidence.*—In an action on a life policy, where the only evidence of the death of the insured consisted of testimony that a deceased person, not shown to have been related to the family of the insured had stated that the insured was drowned, such evidence, although incompetent, was, in the absence of any objection to its admissibility, sufficient to sustain a finding that the insured had died.

Metropolitan Life Ins. Co. v. Lyons, 534, 546 (13).

46. *Trial by Court.—Findings Not in Conformity to Issues.*—In so far as the same affected the transferee, a special finding of fact that a debtor, for the purpose of defrauding creditors, sold and transferred a stock of goods for the sum of \$800, that the transferee at the time knew that the sale was made for the purpose of defrauding creditors and that he then and thereby aided such debtor in defrauding his creditors, was not within the issues tendered by a complaint that proceeded on the theory that there was no actual sale, but that it was simply a sham or pretended sale wherein the debtor retained title and ownership of the goods, so that conclusions of law based thereon were erroneous.

Wills v. Mooney-Mueller Drug Co., 193, 199 (5).

TRUSTS—

Resulting Trusts.—Acts of Church Officers.—Where two churches constituted one ministerial charge, each having its own board of trustees and local officers who constituted the quarterly conference of the charge, and such officers, sitting as the quarterly conference, decided on the purchase of a new parsonage, recommending the amount to be paid by each church and that the property should belong to the two churches jointly, such action did not amount to a contract between the two churches so as to cause the conveyance, taken in the names of persons designated as trustees of the parsonage of the charge for the use and benefit of the ministry and membership of the church in the United States, to operate as a resulting trust in favor of said two churches under the provisions of §4019 Burns 1908, §2976 R. S. 1881, excepting certain cases from the provisions of §4017 Burns 1908, §2974 R. S. 1881, that no trust shall result in favor of one paying the consideration for a conveyance made to another.

Essex v. Hopkins, 316, 322 (4).

“UNILATERAL CONTRACT”—

See WORDS AND PHRASES.

“UNTIL”—

See WORDS AND PHRASES.

VENIRE DE NOVO—

See TRIAL 37, 40-43.

VENDOR AND PURCHASER—

1. *Bona Fide Purchaser.—Secret Equities.*—A *bona fide* purchaser of real estate without notice takes the same free from secret equities, and after acquired notice does not affect his rights.
Young v. Waggoner, 202, 206 (5).
2. *Bona Fide Purchaser.—Rights of Purchaser with Notice from Purchaser Without Notice.*—A purchaser of land, with notice of secret equities, from a purchaser thereof without notice, succeeds to all the rights of his grantor. *Young v. Waggoner*, 202, 207 (6).
3. *Bona Fide Purchaser.—Presumption.—Burden.*—The law presumes the grantee in a deed to be a *bona fide* purchaser, and the burden of overcoming this presumption rests upon him who seeks to impeach the title. *Young v. Waggoner*, 202, 207 (7).
4. *Contracts for the Sale of Land.—Rights of Parties.*—Where an executory contract has been made for the sale of land, equity regards the vendee as the owner, and the vendor as seized of the title in trust for the purchaser, with a lien on the land for the purchase money. *Jordan v. Johnson*, 213, 218 (4).
5. *Contracts.—Waiver of Modification of Prior Contract.*—Where the time of payment as fixed in a contract for the sale of real estate is, by the terms of a duebill given for the unpaid portion of the purchase price, postponed until the delivery by the vendor of an abstract showing a merchantable title to the approval of purchaser's attorneys such provision may be waived by the purchaser. *Lechner v. Strauss*, 414, 422 (3).
6. *Contracts.—Construction.*—A contract for the sale of real estate on specified terms and a duebill given for the unpaid portion of the purchase price, reciting that it is due on or after a certain date on the furnishing of an abstract of title to the approval of the purchaser, must be construed as an entirety, and, if susceptible of two constructions, a fair and equitable construction will be adopted rather than one which would result in injustice. *Lechner v. Strauss*, 414, 424 (4).

VENUE—

See CHANGE OF VENUE.

VERDICT—

See APPEAL 59-75; TRIAL 36-38.

VICE PRINCIPALS—

See MASTER AND SERVANT.

"VOID"—

See WORDS AND PHRASES.

WAIVER—

See APPEAL; ESTOPPEL 2.

Of forfeitures, see LANDLORD AND TENANT 12.

Error in giving an incomplete instruction, which states the law correctly as far as it goes, is waived by failure to tender a more complete instruction on the subject, see TRIAL 21.

Acts Constituting.—Either the intentional relinquishment of a known right or advantage that might have been insisted upon, or such conduct as warrants an inference of such relinquishment, will constitute a waiver thereof.

Templer v. Muncie Lodge, etc., 324, 333 (8).

WARRANTY—

See SALES.

WIFE—

Purchases by, see **HUSBAND AND WIFE** 1-10.

WILLS—

Provision of, see **PARTITION** 2; *Walling v. Scott*, 23, 27 (7).

1. *Construction.—Nature and Character of Property Devise.—*One claiming property under a will must take it in the character impressed upon it by that instrument.

Walling v. Scott, 23, 28 (6).

2. *Construction.—Intent of Testator.—Designation of Devisees.—“Children”.—Illegitimate Child.—*Where, on consideration of a will as a whole, in the light of the circumstances preceding and attending its execution, it appears that the testator, in a devise of land to his son for life with remainder in fee to the son's children, intended to include the son's child of illegitimate birth, such intention prevails and must be given effect.

Harness v. Harness, 364, 370 (5).

3. *Construction.—Intention of Testator.—Extrinsic Evidence.—Admissibility.—*In an action by an illegitimate child for partition of real estate, evidence that the testator had recognized plaintiff as a grandson, and had evidenced an intention of giving him a share of his estate, was properly admitted as bearing on the question of whether the testator intended to include plaintiff in a devise of the land to plaintiff's father for life with remainder in fee to his children.

Harness v. Harness, 364, 372 (6).

4. *Directions in Will.—Power of Sale.—Sale after death of Executor.—*Where the sale provided for in a will can not take place until the death of the executor, the administrator with the will annexed may properly make the sale.

Walling v. Scott, 23, 28 (4).

5. *Directions in Will.—Power of Sale.—Failure to Designate by Whom Sale shall be Made.—*Where a testator directs that his real estate be sold without declaring by whom the sale shall be made, the power of sale is not defeated, but rests in the executor, or administrator with the will annexed. *Walling v. Scott*, 23, 25 (3).

6. *Nature of Title by Devise.—“Child”.—“Children”.—*A title by devise is a title by purchase and not by descent, and the words “child” and “children” ordinarily refer to legitimate children.

Harness v. Harness, 364, 367 (2).

7. *Transfer of Property in Consideration of Love and Affection.—*Property devised or bequeathed by will is not property given or transferred in consideration of love and affection within the meaning of §2997 Burns 1908, §2473 R. S. 1881.

Walling v. Scott, 23, 29 (10).

WITNESSES—

1. *Physician.—Failure to Call.—Effect.—*The fact that the plaintiff in an action for personal injuries did not call a physician who attended him to testify as to his injuries, should not be considered as detrimental to plaintiff's case. *Rump v. Woods*, 347, 356 (11).

2. *Impeachments.—Admissions.—*Where a defendant, testifying as a witness in behalf of his codefendant, denied the existence of an alleged partnership between them, his statements or admissions out of court to the contrary were properly admitted as affecting the weight to be given to his testimony.

Steele v. Michigan Buggy Co., 635, 639 (6).

WORDS AND PHRASES—

The words "child" and "children" ordinarily refer to legitimate children, see WILLS 6; *Harness v. Harness*, 364, 367 (2).

When the word "children" shall include illegitimate child, see BASTARDS 2; *Harness v. Harness*, 364, 367, 368 (3).

The phrase "only children" in the absence of words of qualification, must be construed to include deceased as well as living children, see BILLS AND NOTES 3; *Barrett v. Sipp*, 304, 307 (1).

"The decision is contrary to law" does not perform the office of an exception to conclusions of law stated upon a special finding of facts, see NEW TRIAL 4.

"Duty" meaning of in connection with railroad business, see MASTER AND SERVANT 14.

Use of word "duty," see PLEADING 4; *Chicago, etc., R. Co. v. Hamerick*, 425, 434 (5).

"Equitable election" definition of, see ESTOPPEL 1; *Walker v. Bement*, 645, 659 (15).

The term "excusable neglect" meaning of, see JUDGMENT 5; *First Nat. Bank v. Stilwell*, 226, 231 (2).

"Invalid" when used in regard to contracts not immoral nor against public policy, what it usually means, see STATUTES 2; *Doney v. Laughlin*, 38, 42 (3).

"Recover", meaning of, see REPLEVIN 3; *Thurman v. Miller*, 372, 376 (4).

Use of word "signal" in connection with railroad business, see MASTER AND SERVANT 13.

When the word "to" is used as a conjunction, it is synonymous with "till" or "until" and where the time for doing a thing is "to" a certain day such day is not included, see TIME 1; *Myers v. Winona, etc., R. Co.*, 258, 259 (2).

"Unilateral Contract" meaning of, see CONTRACTS 30.

"Void" when used in regard to contracts not immoral nor against public policy, what it usually means, see STATUTES 2; *Doney v. Laughlin*, 38, 42 (3).

WRITTEN INSTRUMENTS—

If the words of a writing clearly express the intention of the writer, such intention will prevail and extraneous evidence cannot be admitted to show a contrary intention, see EVIDENCE 11.

Ex A J L
12/26/23

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